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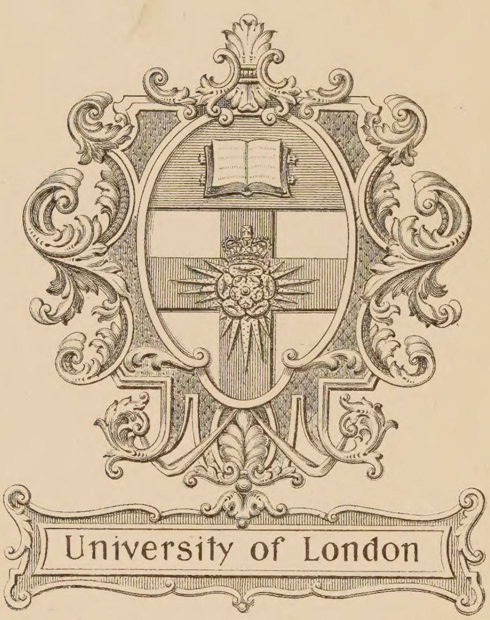

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1938.

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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

THE ROBERTA.

1937
June 16;
July 29.

Shipping—Action in rem—Arrest of first defendants' ship—Bail—Bail not available for benefit of second defendants.

The plaintiffs brought an action in rem in respect of damage to their cargo against the shipowners and arrested the ship, which was released on bail. Subsequently the charterers of the ship were added as second defendants. The plaintiffs' right of action was held to be against the charterers and not against the shipowners; but in third-party proceedings the charterers succeeded in obtaining an indemnity against the shipowners for the damages which they (the charterers) would have to pay to the plaintiffs. The charterers applied that the bail might be made available to meet the claim under the indemnity:—

Held, that the proper course for the second defendants to have taken would have been to sue out a warrant of arrest on their own claim for an indemnity, when the question whether such cause of action gave a right to arrest could have been challenged. In the absence of such action there appeared to be no precedent for the suggestion that plaintiffs in third-party proceedings had any right, after judgment delivered, to an order that bail, put in to answer another party's claim, should be made available to answer their own.

1937

THE ROBERTA.

APPLICATION for the allocation of bail.

On February 7, 1936, an action in rem was instituted by the owners of cargo against the owners of the carrying ship, the motor ship *Roberta*, in respect of damage to the cargo. The plaintiffs arrested the ship, but she was released on a bail bond dated March 9, 1936, being given on the following terms :—

" Whereas an action of damage has been commenced in the "High Court of Justice on behalf of the above named plaintiffs "against the above named defendants, now therefore we "[the sureties] hereby jointly and severally submit ourselves to "the jurisdiction of the said Court and consent that, if they, "the said defendants, shall not pay what may be adjudged "against them in the said action with costs, execution may issue "forth against us . . . . for a sum not exceeding 1300*l*. And we "hereby consent and agree that this bond shall apply to any "compromise or settlement between the parties of the subject-"matter of the action."

By an amendment of the writ on May 19, 1936, the charterers of the ship, Walford Lines, Ld., were added as second defendants. On July 28, 1936, the second defendants took out a summons asking (inter alia) that the bail entered into by the first defendants should be made available for all parties. The assistant-registrar adjourned the summons sine die and no further application was made. On October 10, 1936, the second defendants delivered notice of a claim to be indemnified by the first defendants.

At the trial of the action the Court held that on the bill of lading contract the parties liable to the plaintiffs were the charterers and not the shipowners ; but, in the third-party proceedings between the two defendants, the charterers succeeded in their claim for an indemnity under the terms of the charterparty against the shipowners in respect of the damages for which they (the charterers) as second defendants had been held liable to the plaintiff cargo-owners.

Thereupon the charterers asked for an order that the bail given to answer the plaintiffs' claim against the shipowners should be made available to meet the claim under the indemnity.

H. G. Willmer and *Owen L. Bateson* for the plaintiffs took no part in the arguments, as, on the judgment, the plaintiffs' claim being against the charterers, they had no right to arrest the ship and obtain bail.

J. V. Naisby for the charterers. The bail was given to answer a claim for damage to a particular cargo; there is only one damage to be paid for, and in substance it is the same claim qua both defendants. The charterers' claim for an indemnity is in the cargo-owners' action and the charterers have an interest in the res. Their claim is for damages for breach of charterparty and they could arrest the ship. In *The Joannis Vatis* (1) bail was given, and at a very late stage cargo-owners who had refused to join in the proceedings in which bail had been obtained were allowed to intervene and claim against the fund in Court, and in the present case the charterers applied to have the bail made available at a very early date.

Sir Robert Aske K.C. and *C. A. Roberts* for the shipowners. This is not a case like *The Joannis Vatis* (1), in which all parties interested in the res are entitled to share in the bail; in the present case the bail was put up to cover a specific claim only, that of the cargo-owners, and no one else can share in it: *The Russland.* (2) The form of the bail bond itself shows that it was a specific undertaking in a specific claim. The Court added the charterers as second defendants, and it would be very unfair to the sureties to make the bail effective in favour of parties not contemplated when the bail bond was entered into. Even a slight variation, such as the giving of further time, discharges sureties from their obligation.

[Reference was also made to *The Glamorganshire* (3) and Roscoe's Admiralty Practice, 5th ed., p. 272.]

Cur. adv. vult.

July 29. LANGTON J. read the following judgment:

(1) [1922] P. 92.
(2) [1924] P. 55, 58.
(3) (1888) 13 App. Cas. 454.

The facts as to this matter are that the plaintiffs originally obtained bail from the first defendants, the shipowners, to answer their claim. On July 28, 1936, the second defendants issued a summons asking, among other things, that bail entered into on behalf of the first defendants be made available to cover all parties.

On July 31, 1936, the summons came on for hearing before the assistant-registrar, who, after expressing the view that he had no power to make the order asked for, adjourned the matter generally. According to a note made at the time by a representative of Messrs. W. & W. Stocken, solicitors for the first defendants, the assistant-registrar adopted this course rather than refuse the order because he preferred to take an opportunity of considering the point. The recollection of the representative of Messrs. Sinclair, Roche & Temperley, who attended on behalf of the second defendants, does not differ materially. This gentleman's memory is not supported by any contemporaneous note, but he seems to have gathered the impression that, whatever may have been the assistant-registrar's motive for adjourning the matter, it was very unlikely that he would make the order desired at any subsequent date. No further application was made in the matter until it was raised before me on June 16.

Upon the merits of the question it is important to note that the second defendants, Walford Lines, Ld., originally appeared in this action as defendants only. The writ was issued on February 7, 1936, by the plaintiffs against the first defendants. It was a writ in rem, and the *Roberta* was arrested on the same day and released shortly afterwards upon an undertaking, a bail bond being completed for 1300*l.* on March 9. The bail bond refers to the " said defendants," meaning of course only those parties who were then defendants—namely, the owners of the *Roberta*. After various steps in the action the second defendants in July of the same year obtained an order from the assistant-registrar allowing them to claim by way of third-party proceedings.

It would appear to be axiomatic that Walford Lines, Ld., are only entitled to bail if they have a claim which they can enforce by an action in rem, that is, which falls within the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 22 and 33.

I do not think that this matter can be resolved by arguing along the lines of such decisions as *The Gemma* (1) and *The Dictator* (2) and saying that, as an action in rem becomes an action in personam when the defendants appear and put in bail, the original rights of Walford Lines, Ld. are immaterial once the action has become an action in personam. It is no doubt true that, as between the plaintiffs and the owners of the *Roberta*, the action had become in personam before the second defendants were joined; but as between the second defendants seeking an indemnity against the first defendants, which is quite a new order of proceedings, it could hardly be right to allow the second defendants to acquire or to assume a right which they would never have possessed if the plaintiffs had not for their own purposes and through their own activities secured bail.

Speaking for myself, I am far from satisfied that a claim for indemnity is a right of action which can be enforced by an action in rem, but for the purposes of the present claim I am going to assume that it comes within the words of s. 22, sub-s. 1 (*a*) (XII.) (1.) of the Supreme Court of Judicature (Consolidation) Act, 1925: "any claim arising out of an "agreement relating to the use or hire of a ship." The question then arises whether the second defendants to-day can claim the benefit of bail given to safeguard the plaintiffs. Sir Robert Aske, on behalf of the first defendants, placed great reliance upon the wording of the bail bond and the position of the sureties to the bond. He argued that it would be most unfair to the sureties to saddle them with a second liability when they had only undertaken the first. I must confess that the argument struck me as a little unreal. It is really impossible to suppose that sureties in these matters are governed by any but purely business considerations, and the idea that they have nicely appraised the legal and litigious chances of the parties for whom they are going bail is a

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(1) [1899] P. 285.

(2) [1892] P. 304.

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figment of the imagination rather than even a shadow of the reality.

On the other hand, it is most necessary to bear in mind that, quite apart from the interests of the sureties, the bail in this case was put in to answer the claim of the plaintiffs against the first defendants and the plaintiffs have failed in that claim and against that bail. Aided by the learning and research of the Registrar I have been able to satisfy myself that if the second defendants are entitled to be treated as plaintiffs, as I have assumed, they would be entitled to separate bail for their claim. The cases which establish this proposition are: *The Saracen* (1), and on appeal, sub nom. *Bernard* v. *Hyne* (2); *The Clara* (3); and *The Pisaqua.* (4)

If, upon separate bail being asked for on a second claim, the shipowner takes steps to limit his liability, a fund common to all may be paid into Court. Similarly, if the shipowner offers to give bail in a sum equal to the limit of the liability or to the value of the vessel a common fund may be established.

The Joannis Vatis (5) and *The Russland* (6), which have been cited in argument, are neither in point, since in each case a common fund had been established, in the first case by an undertaking to put in bail for the full value of the vessel, and in the second by the sale of the vessel.

In the present instance there is no common fund at all and there is nothing to show that the sum of 1300*l.* would exhaust the value of the vessel. No reason therefore exists for the constitution of a common fund or for treating a fund which came into being for one purpose only as if it were a fund for other purposes.

The proper course for the second defendants to have taken would have been to sue out a warrant of arrest on their own claim, when the question of their right to arrest could have been challenged, if it were thought desirable to do so, and to pursue by the regular and normal course their right, if any,

(1) (1846) 2 W. Rob. 451, 457; 4 N. of C. 498, 507.

(2) (1847) 6 Moo. P. C. 56, 75.

(3) (1855) Sw. 1, 4.

(4) Unreported [1912] Fo. 172.

(5) [1922] P. 92.

(6) [1924] P. 55.

to obtain bail. It is, of course, possible that, if this line of action had been pursued, the first defendants might have offered to allow the bail to stand also in respect of the second defendants' claim. It is even possible that at some stage of such proceedings the Court might have interfered to order that the same fund should stand for both purposes. In the absence of such action, however, I cannot find any precedent for the suggestion that plaintiffs in third-party proceedings have any right, after judgment delivered, to come to the Court to ask that bail which was put in to answer some one else's claim should be made available to answer their own. Up till now the point has been raised in this case only by way of an abortive summons, and even if the Court has power to deal with the matter at this stage, which I rather doubt, I do not think that it would be just to make the order which is asked for.

Solicitors for the plaintiffs: *Bentleys, Stokes & Lowless.*

Solicitors for the first defendants: *W. & W. Stocken.*

Solicitors for the second defendants: *Sinclair, Roche & Temperley.*

E. C. M. T.

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Summary jurisdiction—Desertion—Summons of wife for maintenance on the ground of desertion—Husband justified in leaving wife—Adultery of wife—Statements of wife as to doubtful paternity of child admissible as evidence of adultery—Conduct of wife—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 6.

The wife alleged that the husband had left her without cause and had, therefore, been guilty of desertion. The husband's case was that he left his wife because she stated that a child with which she was pregnant would have to be kept by him whether it was his or not. There was no attempt to negative access by the husband to the wife at any material time. In addition to the evidence as to the child, indecent literature had been found in the wife's possession and an indecent letter had been written by her:—

Held, that the statement by the wife, although amounting to a doubt with reference to the paternity of the child, was not an attempt by her to bastardize the child so as to be inadmissible in evidence under the rule in *Russell* v. *Russell,* but was an admission that at a material time a man other than her husband had had intercourse with her and was therefore admissible as evidence that the husband had reasonable grounds for leaving his wife.

Warren v. *Warren* [1925] P. 107 followed.

Russell v. *Russell* [1924] A. C. 687 distinguished.

APPEAL from a Court of Summary Jurisdiction.

Hannah Roast, the appellant, appealed from the decision, dated August 18, 1937, of John Harris, Esquire, one of the magistrates of the Metropolitan police courts, sitting at the Thames police court, dismissing a summons of the appellant under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, complaining that James Henry Roast, her husband, had deserted her on August 3, 1937. The husband alleged that he had reasonable cause for leaving the wife. The parties were married in 1920. There were three children, aged sixteen years, nine years and two months respectively.

The wife's evidence was that the husband left the wife on the date alleged. He had told his wife that "he had "some one else." He had asked her to divorce him and given her the evidence for it. In cross-examination the wife admitted that the husband had complained of her association with other men. She denied adultery with a married man and that she had admitted adultery quite recently committed with seamen on board a ship. She returned to her husband about August, 1936, after a separation, because she had lost a situation and had nowhere else to go. He was living with another woman. On May 28, 1937, she gave birth to the third child, a full time one. She had been sleeping with her husband on occasions before and since August 28, 1936. When he took her back he knew she was pregnant. She was also cross-examined with reference to indecent literature in her possession and a letter of the same description which she denied writing.

The husband gave evidence that the parties had been separated three times and that he had caught his wife with a man. She had admitted adultery. The date he gave for his wife's return was September 18, 1936, and he had intercourse with her on that date. His wife had told him that he would have to keep the last child whether his or not. This aroused his suspicions and he left her bed.

(It did not appear that this alleged statement by the wife was put to her.)

He had paid her £1 a week since he left her.

In dismissing the summons the magistrate said that a good deal depended on the paternity of the third child. He made no finding on that, but he was satisfied that the husband on the whole had told the truth and that the wife had not. The husband said that the wife had made an admission about the child and it was significant that it was the wife who was the suppliant in August or September, 1936. He had no doubt that the wife wrote the indecent document and the letter which had been produced. He was satisfied that the husband was justified in leaving her. The summons must be dismissed.

The wife appealed. The grounds were (1.) that the magistrate was wrong in law, (2.) that the magistrate was wrong in law in holding that the husband had cause for deserting his wife, (3.) that the magistrate was wrong in admitting, or should have disregarded, evidence by the husband of want of intercourse tendered to bastardize a child born in wedlock, (4.) that the decision was against the weight of evidence, (5.) that there were no grounds disentitling the appellant to maintenance.

Action Pile for the appellant. The statement of the appellant implying that the child was not the child of the husband is not admissible: *Russell* v. *Russell.* (1) In consequence the same statement, even if made, is no admission of adultery.

He referred to *Boston* v. *Boston.* (2)

Stanley Rees for the respondent. The magistrate saw the parties. On their evidence as a whole he was right in holding that the respondent was justified in leaving the appellant because of her conduct.

THE PRESIDENT (SIR BOYD MERRIMAN). This is an appeal from the learned Metropolitan magistrate sitting at the Thames police court, and we were told that the substance of the appeal was that the learned magistrate had given a decision in conflict with the well known rule in the case of *Russell* v. *Russell* (1) in the House of Lords. The matter arose in this way: the wife, complainant, was claiming maintenance from her husband on the ground of desertion. The fact that a state of non-cohabitation had been set up by the husband actually leaving the matrimonial home on August 3, 1937, was common ground. The issue was whether he had just cause for leaving. If he had, then he was not in a state of desertion, and the magistrate so held. It is said that he arrived at that decision because he accepted, in defiance of the rule in *Russell* v. *Russell* (1), evidence as to the paternity of a child which had been born on May 28, 1937, and because of that, and solely because of that, he had been induced to find that the wife had committed adultery and, therefore, the husband was entitled to leave. This necessitated our examining both the evidence which was given in the case and the magistrate's reasons.

(1) [1924] A. C. 687.

(2) (1928) 138 Law Times 647.

The admitted facts are that the wife had been apart from her husband for some time before August, 1936. It is admitted that at about that time—and I use the word "about" advisedly—she returned to her husband. The controversy is whether she returned by August 28, 1936, or whether at the latest she returned by September 18, 1936. She says August 28, 1936, he says September 18, 1936. It will be observed, of course, that one date is precisely nine months before the date of the birth and the other is eight months and ten days, and it is common ground that from whichever of these dates it was, until March, 1937 the husband and the wife slept together as man and wife. I start, therefore, by calling attention to the fact that it is impossible for anybody to say in a Court of Justice that the husband could not have been the father of this child. That seems to be a vital fact in considering whether the rule in *Russell* v. *Russell* (1) applies at all. I do not think any man can be heard to say, having regard to what everybody knows is the normal fluctuation in the period of gestation, that he could not have been the father of a child born eight months and ten days after the time when he admits he had intercourse with his wife. So far, except for discrepancy of date, the facts are uncontroversial. Now the controversy begins. First of all, the husband says that long before that reconciliation, if it was a reconciliation in any real sense of the word, at any rate long before the wife came back, she had been misconducting herself with at least one man and that she had so admitted. Quite plainly, of course, anything of that nature was condoned, ipso facto, by his taking her back. At any rate, he swore that she had admitted misconduct to him. She swore, curiously enough—I do not wish to turn this against her in any way because it is a little doubtful to what date the admission relates—that he knew that she was pregnant when he took her back. I am not using that against her at all, but only to show that whatever the date to which that refers there is a conflict of evidence between her and the husband, who swore on the other hand that he did not know until March, two months before the birth of the child,

(1) [1924] A. C. 687.

that she was pregnant, and there was nothing about this pregnancy to arouse his suspicion at all. She made a remark to him in April, about which I shall have to say more in a moment, and the moment the remark was made he left her bedroom and never slept with her again, because he became suspicious. For that reason, I say in passing, to show that the point has not been overlooked, that I think we are absolved from considering any issue of condonation, not merely because it was not raised in the Court below, but because that piece of evidence was probably the reason why it was not raised.

The child, as I said, was born on May 28, 1937. At some date in April, according to the husband's evidence, the wife said—and the evidence was given twice—" I would have to "keep the child whether it was mine or not." He added, "I then became suspicious and left her room." He is cross-examined and repeats, " She told me I would have to keep the "child whether it was mine or not." She denied, though not in terms, that she had ever said that (because she gave evidence first and that particular phrase was not used till the husband gave his evidence), but she had denied absolutely, categorically and definitely, that she had ever committed adultery with anybody or that she had ever made any sort of admission that she had committed adultery. So that in the main, at any rate, if not in detail, there was a clear conflict between her and her husband, though I agree with what was said in the course of the argument, that it was unfortunate, as things turned out, having regard to the importance which must be attached to that phrase, that she was never asked specifically whether she had used it, or what were the precise words which she had used. However, there is a conflict between the husband and wife on the vital issue whether she had said anything at any time admitting adultery, and a still more vital conflict between them as to whether she had ever committed adultery, which she denied. But that is not the end of the conflict between the husband and the wife. The husband said that on an occasion after she had returned—about three months after she had returned, which would be, of course, somewhere at the latter end of 1936—her handbag had fallen to the ground and out of it had come the indecent writing which has been produced. I do not propose to read what is on this piece of paper. Suffice it to say that it is a string of verses of a singularly lewd character, every line beginning with the letters of the alphabet in sequence and referring expressly or impliedly to some detail in the act of sexual intercourse. It is a perfectly filthy poem and it is not necessary to quote anything from it. The husband said: "That is in my wife's handwriting and it fell out of her "bag three months after she came back to me." The wife said: "It is not in my writing at all, I have never seen it, I "know nothing about it, I did once see a print of some verses "like that, they were shown to me by some barmaids, but I "know nothing whatever about this copy here. It is not in "my writing." It is now admitted to be her writing. The learned magistrate on ample material—because we have seen specimens of her handwriting which he made her write out—came to the conclusion, quite rightly, as it now turns out, that she was lying about that and that this filthy thing was written out by her, wherever she got it from. Counsel now seeks to tell us (and the statement received the attention which afterthoughts of that kind do receive on appeal when the witness herself has given her version of the history of the paper) that, in fact, she copied it out at the husband's dictation. All I can say is that, if that is the explanation, it is singularly unfortunate that she did not give it when she had the opportunity to give evidence to the learned magistrate, and it is not on statements of that sort that one can decide appeals.

So much for the evidence which, in my opinion, was unquestionably relevant; but there is a piece of evidence which, in my opinion, ought not to have been admitted, though for reasons which I will give I am doubtful whether it really infringes the rule in the *Russell* case. (1) I will now read the whole passage from the evidence upon which the case really turns. The husband says: "In March, "I did know of her condition, it was apparent then, I slept

(1) [1924] A. C. 687.

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"with her and had connection with her up till April, I did not "then know about it." Then there is a blank; it may be that some word is missed out, at any rate it is accepted as quite obvious by everybody that what he is referring to is, "I did "not then know about her having had connection with "anybody who might be the father," or words to that effect; whatever the actual words it disposes, as I have already said, of the question of condonation. Then he goes on: "If it was "my child it would not have been born till June. She can "be very brazen at times. She told me I would have to keep "the child, whether it was mine or not." Now it is quite plain, since the decision in *Russell* v. *Russell* (1), that a husband cannot prove the adultery of his wife at a time, at any rate, when they were nominally living together or, to put it the other way, when they were not living apart either under a formal agreement or an order of the Court, by saying that at the time of possible conception he did not, in fact, have sexual intercourse with his wife, and, of course, in this sentence he is trying to say that; he is in effect saying: "I did not have "sexual intercourse with my wife when I took her back till "September 18, and, therefore, a child born on May 28, "cannot have been conceived as a result of intercourse with "me." So far I am quite satisfied that that evidence, even if it was not strictly inadmissible, ought not to have been given, because he, at any rate, was trying to say, whether he could in law say it or not: "I did not have access at the material "date." I wish to add that I doubt whether any Court could possibly, assuming it believed that evidence literally and absolutely, be asked upon that to find that adultery was proved by the birth of the child, seeing that on his own admission the date before the date of the birth on which he admits he had connection with his wife was as long as eight months and ten days. In other words, the evidence, though undoubtedly given for the purpose of proving that he could not have been the father, so manifestly fails on the face of it to effect that purpose that it seems to me really to be unnecessary to consider its bearing further. The learned magistrate has said

(1) [1924] A. C. 687.

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definitely and absolutely in his reasons that he makes no finding as to the question of paternity. I had better read the whole of his reasons: "The defendant has left his wife and "will not go back. His reason is that she has been unfaithful. "A good deal turns on the question whether it is his child or "not. I make no finding as to its paternity, but I am satisfied "that the defendant, on the whole, has told me the truth, and "that his wife has not. The defendant says she made an "admission about the child and it is significant that it is the "wife who was the suppliant last August or September. No "doubt the defendant has a past, too. I have no doubt in my "own mind of any sort that the wife wrote out that document, "and the defendant, who ought to know, says it is her writing. "I am satisfied defendant was justified in leaving her." I agree that it is possible to direct criticism to the wording of those reasons. I agree that the phrase, "A good deal turns "on the question whether it is his child or not," is a phrase which raises the sort of difficulties with which counsel for the appellant had made full play. But that, in my opinion, must be taken with the next sentence. The learned magistrate says that he is making no finding as to paternity. In my opinion it is vital to appreciate where this case differs from a case in which it could be said that the rule in *Russell* v. *Russell* (1) was infringed. When a husband comes to Court and seeks to prove adultery merely by saying that a child has been born and tendering evidence that he could not have been the father, you get the *Russell* v. *Russell* (1) case. If he tries to say that himself, though he was serving in Singapore at the time when the child must have been conceived, we are obliged by *Russell* v. *Russell* (1) to say that he cannot be heard to say it. But somebody comes from the Admiralty or the War Office, or as the case may be, to say that the husband was in Singapore at that time, and the case is decided then upon the evidence of the officer who is sent for that purpose. That is a case which depends solely and entirely not upon evidence of adultery with any man, not upon evidence of any admission by the wife of adultery with any man, not upon evidence of association,

(1) [1924] A. C. 687.

or anything of that sort, but upon the simple fact that a child is born on a certain date and that the husband could not have been the father because it was not possible that he could have had sexual intercourse with his wife at any relevant date. That is not the case here. I have already said that evidence even if believed—even if it was admissible and believed—that this man did not have sexual intercourse with his wife before September 18, leads him nowhere; it does not begin to make a case of that sort. It is one thing to say that there is evidence that the child cannot be the child of the husband, and it is quite another thing to say that there is evidence that it may be somebody else's child. In my opinion this case is a case of the latter class. The evidence which, upon a conflict of evidence, the magistrate believed, was evidence that the wife had expressed a doubt whether the husband was the father. That does not bastardize the child, it does not infringe the rule in *Russell* v. *Russell* (1), but it shows that in her own mind she knew that there were, and said that there were, two or more people who might be the father, only one of whom could be the husband, and that is, having regard to the laws of nature, an admission that some other man had had sexual intercourse with her at a material time. In my opinion, therefore, this case comes down to the simple question—nothing whatever to do with *Russell* v. *Russell* (1)—whether the phrase the wife used could be construed by the magistrate as an admission of adultery. I wish to say in passing that a good deal of guidance is to be drawn from the decision of the late Swift J. in *Warren* v. *Warren.* (2) He was sitting at that time as an additional judge of this Division and he gave a decision which has been consistently followed in this Division. I will read the headnote. "A wife's "admission that she had committed adultery, even if "accompanied by a statement of her belief that a child, "subsequently born, was the result of the adultery, cannot "bastardize the child without evidence of the non-access of "the husband. The confession of the wife, therefore, that she "has committed adultery is admissible as evidence in a suit for

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(1) [1924] A. C. 687.

(2) [1925] P. 107.

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"divorce so long as she does not assert that the husband "could have had no access at the time of conception." In this case both parties were asserting, at least the wife was certainly asserting, that the husband could and did have access to her at the time of conception. The husband was asserting that he could and did have access to her at a time, not indeed which she said was the time of the conception, but at a time less than three weeks later. Neither of them could possibly have been heard to say that that evidence bastardized this child, and, therefore, if the wife had said in terms, "I committed adultery, but I do not know whose "the child is," Counsel does not dispute that this Court could and ought to listen to the admission "I committed "adultery," or consider whether there is a necessary inference of it from what she does say while rejecting anything which would cast reflection, if it could cast reflection, on the paternity of the child. It all, therefore, comes down to this, and to nothing else but this: was the phrase about which the magistrate says he believes the husband's evidence sufficient to constitute an admission of adultery? I do not know myself what could be stronger. Quite plainly it does not matter what form of words is used; the question cannot turn upon whether the wife says expressly "I have committed adultery" or whether that is a necessary inference from what she does say. To my mind a woman who does not say "I have never com-"mitted adultery with any man, never had sexual intercourse "with anybody except my husband," but on the contrary is believed to have said "You will have to keep this child whether "he is yours or not," is, in my opinion, saying something which suggests in the plainest possible terms that she has had intercourse with some other man than her husband. In the conflicting state of the evidence on the question whether the wife had, in any form of words, admitted adultery the learned magistrate was, in my opinion, entitled to have regard to the conflict on the question whether those filthy verses were in her writing, not for the purpose of showing that she had adulterous habits, or was a woman of lewd mind—that is not the point—but to enable him to make up his mind where the truth lay. In my opinion as soon as he decided that the husband was to be believed, and the wife herself had thrown doubts on the question about the paternity of this child, he was entitled to say that that was an admission by her that she had committed adultery. He was entitled to say that, because it was not disputed that the husband first had that doubt brought home to him at a time when she was just about to give birth to the child, and he never condoned it when once he had become convinced that that was what she meant ; and there was, therefore, no statutory bar to giving the husband the relief to which he was entitled against any claim by the wife that he had deserted her without just cause. I think, in conclusion, that if what the learned magistrate said is viewed in the light of these considerations it will be seen that that—if perhaps not altogether happily expressed—is what he meant by the words: "His reason [for "leaving her] is that she has been unfaithful. A good deal turns "on the question whether it is his child or not. I make no finding as to its paternity . . . . " Supposing one reads that, as I think the context demands one should read it : " A good "deal turns on whether she raised the question whether it "was his child or not, but I make no finding as to paternity," the whole thing is quite simple. That, in my opinion, is the real underlying reason for the magistrate's decision.

In my opinion this appeal should be dismissed.

BUCKNILL J. I agree. At the same time I think it my duty to say that the case does present some considerable difficulties. One has first of all, however, to bear in mind what is the real issue in the case. The real issue in the case is not whether the wife had committed adultery or not, but whether the husband had reasonable cause to leave the wife, and on that issue there is a specific finding by the magistrate that the husband was justified in leaving her, and he came to that decision after seeing witnesses and accepting the evidence of the husband and rejecting the evidence of the wife. His opinion on that matter is abundantly confirmed by what we have heard to-day as to the real authorship of the filthy

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Bucknill J.

document that has been put in. But the difficulty to my mind in the case arises because a good deal of evidence was given by the husband tending to show that he could not be the father of the child. The evidence to my mind was inadmissible because it was evidence of non-intercourse, or non-access of the husband, which may possibly have the effect of bastardizing the child of a married woman. I quote that from the judgment of Swift J., to which my Lord has referred. That evidence was tendered, it was not objected to, and it was accepted by the learned magistrate, and it is extremely difficult for any Court reviewing his judgment to know what value, if any, he attached to it. But quite apart from that evidence it seems to me that there was abundant material for the magistrate to come to the decision at which he has arrived that the defendant was justified in leaving his wife. There is first of all the admission by the wife, to which my Lord has referred, an admission which, if it was made, can only mean that in the mind of the wife there was a doubt as to whether some other man was the father of her child. It is, however, unfortunate that that admission was not put to the wife, and, speaking for myself, I do not think too much importance should be attached to remarks made by the wife to the husband or by the husband to the wife. But that is a matter for the magistrate, who saw the witnesses, to consider, not for a Court which is reviewing his decision to attach weight to certain evidence. He accepted the evidence of the husband. He says in terms that the defendant said she made an admission about the child, and he says he is satisfied that the defendant has told him the truth. She, also, by her conduct, in the mind of the magistrate, acted in a significant way. At the time when the conception started she wanted to come back to her husband, and if an admission by the wife is admissible against her I think her conduct tending to show the same result is equally admissible. Then, apart from that, there is the evidence of the recent visit to the ship; weight has to be attached to that. I can hardly believe that "Quite "recently," means a visit which took place a year before. Then there is this filthy paper, admittedly in her writing, found

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in her bag after she had come back to him. In my view taking the whole of the evidence which is admissible, the magistrate was justified in coming to this conclusion that the defendant had grounds, and reasonable grounds, for leaving her, and that there are no proper grounds for our differing from his judgment.

Solicitor for the wife: *Edward Fail.*
Solicitors for the husband: *C. V. Young & Son.*

R. M. M.

THE NEPTUN.

1937
Nov. 3, 4, 5, 8, 9, 10, 11, 29.

Shipping—Vessel stranding in navigable channel—Duties of buoyage and beaconage authorities—Humber Conservancy Board.

On June 27, 1936, the plaintiffs' steamship, outward bound from Goole, became a total loss through stranding a little below the Middle Whitton lightship in the Upper Humber, for which the defendants, the Humber Conservancy Board, were the buoyage and beaconage authority.

The plaintiffs alleged that the defendants levied dues as a buoyage and beaconage authority and that as such it was their duty and/or their contract with the owners of vessels to exercise reasonable care in the performance of their functions to keep the channels safe for vessels to navigate in, and to place lightships in such positions as would indicate to vessels where the deep water channels were; that the information supplied by the defendants (and in particular a chart published on May 27, 1936) indicated a minimum depth of 3 ft. at low water ordinary spring tides throughout the Whitton channel; that from time to time the defendants issued notices indicating a less depth, and that, no such notice having been issued, the information given raised a representation or warranty that a depth of 3 ft. could be relied on. The plaintiffs calculated that on this information there would be a minimum depth of 16 ft. 6 ins. while navigating the channel, and that, on the draught of the vessel, they would have a margin of between 1 ft. 2 ins. and 1 ft. 6 ins.

It was in evidence that the channels in the Upper Humber changed their course frequently and rapidly, that the lightships had constantly to be moved, and that the Upper Whitton lightship had been shifted on June 27 before the accident happened:—

Held, that the liability of the defendants depended upon the special relationship which arose through their taking dues; that this relationship, though not exactly that of invitor and invitee, imposed duties analogous to the common law duties existing between invitor and invitee to take reasonable care; that the issue of the information and charts did not give rise to a representation or warranty that a minimum depth of 3 ft. would be found on any given date in a bed of a river which was constantly changing; that the defendants had not been negligent as regards the frequency or extent of their soundings or in the placing of the lightships; and that the action failed.

Scope of the obligations of a buoyage and beaconage authority outlined.

DAMAGE BY STRANDING.

The plaintiffs were the owners of the steamship *Neptun* and the owners of the cargo lately laden on board her; the defendants were the Humber Conservancy Board.

According to the statement of claim, shortly before 2.15 P.M. on June 27, 1936, the *Neptun*, a steamship of 941 tons gross, while outward bound from Goole with a cargo of coke breeze, in charge of an Upper Humber pilot, when in the navigable channel indicated by the Middle and Lower Whitton lightships, struck on the bottom of the channel and remained fast. It was then shortly after high water and, as the tide ebbed, the *Neptun* broke her back and, together with the cargo, became a total loss.

The plaintiffs alleged that, by virtue of various statutes, the defendants, as the Conservancy Authority, received dues from vessels navigating in the Humber, and that it was their duty and/or their contract with the owners of vessels to exercise reasonable care to keep the channels clear of obstructions and safe for vessels to navigate in, or alternatively to give warning that no such care had been exercised. Further, it was the defendants' duty, as the buoyage and beaconage authority, to place lightships and/or buoys in such positions as would indicate to vessels where the deep water channels were. Alternatively, by placing lightships, buoys and beacons in the river, the defendants impliedly warranted that they were placed so as to mark correctly the deep water channels. The defendants exhibited at their office at Goole a plan, which was renewed from time to time, purporting to show the depths of water prevailing at low water ordinary spring tides through the Whitton channels. When the *Neptun* passed Blacktoft, where a tide board was exhibited showing the height of the water, the tide was about high water, and the board indicated a rise of tide of 13 ft. Relying on the board, and upon the soundings on the defendants' plan, the pilot of the *Neptun* calculated that when he reached the Whitton channel there would be a depth of water of not less than 16 ft. 6 ins., and that the *Neptun* would be drawing 15 ft. 2 ins.

The plaintiffs alleged that the damage was caused by reason of the breach of contract and/or breach of duty and/or breach of warranty and/or negligence of the defendants.

By their defence, the defendants denied the alleged contracts, duties and warranties, or that they had been negligent. They denied (*a*) that the light-vessels were so placed as not to mark the channel correctly, and (*b*) that the plan, corrected to May 27, 1936, indicated that a minimum depth of 3 ft. was available at low water ordinary spring tides throughout the channel. Further, the plan was stamped as follows: "The Humber Conservancy Board give notice that whilst "every care is taken in the preparation of this chart, they "do not accept responsibility for any inaccuracy therein." The channel, in common with the other navigable channels in the Humber, constantly shifted in position and changed in depth, as was, or ought to have been, known to the pilot of the *Neptun*. In consequence of the shifting of the channel the two light-vessels had been moved since the date of the plan of May 27, and the defendants published notices of these movements of which the pilot ought to have been aware. Consequently, the defendants said, he ought not to have relied upon either the position of the channel as shown on the plan or the depths of water indicated thereon.

K. S. Carpmael K.C. and *H. G. Willmer* for the plaintiffs. As Conservators of the River Humber and the buoyage and beaconage authority the defendants took dues and had control of the navigable highway. In these capacities they failed to use reasonable care as regards the upkeep of the channels. They did not know that there was insufficient water until the *Neptun* grounded. They did not take sufficient soundings; if they had done so they would have discovered the bank of sand in the channel. The defendants issued charts and plans, and in particular the chart dated May 27, 1936, from which the plaintiffs, in the absence of any later information to the contrary, were entitled to assume a depth in the Whitton channel of at least 3 ft. at low water ordinary spring tides. The defendants in fact took soundings on dates subsequent to this, but no fresh charts, plans or warnings were issued, and consequently they impliedly represented that the same depths would be found.

G. St. C. Pilcher K.C. and *Cyril Miller* for the defendants.

The action fails because there is no common law liability on the defendants. The Upper Humber is a public navigable highway and in no way an artificial waterway. The defendants cannot exclude the public, but they do not invite them. They are merely a Conservancy Board and have certain duties as regards buoying and lighting ; they are not in the same position as a dock or harbour authority. Although they take dues, to get a common law liability there must be an express or an implied invitation. There is no contractual relationship between the defendants and the owners of passing vessels, and there is no duty at common law to maintain any channel at all : see *Brackley* v. *Midland Ry. Co.* (1) The foreshore was vested in the Conservators for the Humber for 999 years in 1868 (see 31 & 32 Vict. c. lviii. (Schedule and s. 4)), but the powers of the Hull Trinity House were not abolished until 1907 by the Humber Conservancy Act of that year (7 Edw. 7, c. xcvii., s. 41), and by s. 69 the Conservancy Board were authorized to levy dues, primarily in respect of buoys and beacons. Their only duties as a buoyage and beaconage authority are those which formerly were carried out by the Hull Trinity House—duties which were acquired by prescription. The plaintiffs have not defined the duties in their pleadings, and it is difficult to ascertain exactly what those duties were. But whatever standard of care they required it cannot have been as stringent as the standard which the defendants have set for themselves to render the channels safe for navigation.

Even if there be a duty to place lightships to indicate a practicable navigable water-way, there is no duty to buoy each side to indicate the limits of the channel : cf. *Sheppard* v. *Glossop Corporation.* (2)

[LANGTON J. referred to *Penny* v. *Wimbledon Urban District Council.* (3)]

The defendants cannot control the depth of water in channels which are constantly changing, and no representation can be implied from the chart issued on May 27 that the same depth of water would be found on June 27, quite apart from the notice stamped upon the chart that the defendants accept no responsibility for any inaccuracy. The plaintiffs must satisfy the Court that the defendants were negligent, and neither in the soundings taken nor in the placing of the lightships has any negligence been shown. The defendants acknowledge a duty to exercise reasonable care in placing their lightships, but not as regards taking or advertising soundings. If, however, they do advertise them, the defendants acknowledge a duty to take reasonable care that, when issued, the soundings are accurate.

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(1) (1916) 114 L. T. 1150.

(2) [1921] 3 K. B. 132.

(3) [1898] 2 Q. B. 212.

K. S. Carpmael K.C. in reply. If the defendants decide to buoy or light a particular waterway, they must not set a trap, and they must use reasonable care to avoid causing danger to persons using the highway: see per Atkin L.J. in *Sheppard* v. *Glossop Corporation* (1), see also *Queens of the River Steamship Co.* v. *Conservators of the River Thames* (2); and it makes no difference whether or not they exercise their powers for profit: *Mersey Docks and Harbour Board Trustees* v. *Gibbs*. (3) The defendants knew, or if they had taken better soundings they would have known, of the obstruction of sand, and they failed to warn the plaintiffs. Their duty arises de novo as each ship enters the Humber; it is a duty analogous to that existing at common law between invitor and invitee to see that the river is reasonably safe: see Wright J.'s judgment in *St. Just Steamship Co., Ld.* v. *Hartlepool Port and Harbour Commissioners*. (4) It is really a quasi-contractual relationship: see *Morgan* v. *Ravey* (5)—an innkeeper case—the innkeeper is bound by law to receive travellers, the defendants here are bound to receive ships if they pay dues: see also *The Moorcock*. (6)

[LANGTON J. referred to *Ellis* v. *Fulham Borough Council* (7) and *Robert Addie & Sons (Collieries), Ld.* v. *Dumbreck* (8) there cited.]

(1) [1921] 3 K. B. 132, 150.
(2) (1906) 22 Times L. R. 419.
(3) (1866) L. R. 1 H. L. 93.
(4) (1929) 34 Ll. L. Rep. 344, 348.
(5) (1861) 6 H. & N. 265, 276.
(6) (1888) 14 P. D. 64.
(7) [1938] 1 K. B. 212.
(8) [1929] A. C. 358.

The plaintiffs are not mere licensees inasmuch as they pay dues; they are in the same position as invitees and the defendants owe them similar duties: see *Anchor Line* v. *Dundee Harbour Trustees.* (1)

Cur. adv. vult.

1937. Nov. 29. LANGTON J. read the following judgment:—On June 27, 1936, the Danish steamship *Neptun*, in the course of a voyage from Goole to Hull, stranded in the River Humber at a distance of about 120 yards below the Middle Whitton lightship. The tide at the time was falling quickly and in spite of all efforts to get her free the *Neptun* remained aground. About four hours after she grounded the *Neptun* broke her back and became a total loss, together with the cargo on board of her, which consisted of about 1353 tons of coke breeze. The plaintiffs blame the defendants, the Humber Conservancy Board, for this casualty, and have presented a claim against the Board for the value of the ship and cargo.

The *Neptun* is a steel screw steamship belonging to the port of Esbjerg, of 941 tons gross, 549 tons net, 224·3 ft. in length and 33 ft. in beam. The distance from Goole to Hull is about twenty-eight miles. The first part of the passage is down the River Ouse to the point of confluence of the Ouse and the Upper Humber. Thereafter the vessel had to proceed down the Upper Humber to Hull roads. The navigation of the Upper Humber is never simple, and is at times and in varying parts difficult and critical. On June 27, 1936, the most difficult portion of the navigation was the stretch of about half a mile between the Middle Whitton lightship and the Lower Whitton lightship. The bottom of the Upper Humber is almost wholly composed of sand, and this sand shifts rapidly and almost continuously, with the result that the navigable channels are constantly changing and the lightships and beacons employed to indicate them have to be shifted frequently. On the day in question, June 27, the Middle Whitton lightship had been moved from the position which it had been occupying since

(1) (1922) 10 Ll. L. Rep. 47.

June 17. In order to gain some idea of the frequency with which moves have to be made it is instructive to note how this vessel had been shifted between the dates of May 27 and June 27, 1936. On June 9 the lightship was moved a distance of approximately 800 ft. down river in an east-south-easterly direction. Hardly more than a week after, namely, on June 17, it was moved another 800 ft. or more down river in much the same direction. But on June 27 it was moved again up river in a direction about west by south over a distance of close upon 1000 ft. The pilot of the *Neptun* was aware before leaving Goole on June 27 that changes had been observed in the navigable channel, and that the lightship had been moved anew.

It is common ground that in the course of the run from Goole to Hull there is only one practicable stopping place for vessels. At a place called Blacktoft, on the east side of the River Ouse, there is a line of wharves and jetties with the necessary mooring facilities at which vessels can lie in safety through the ebb tide. When once Blacktoft has been left behind on the down river journey a vessel bound for Hull roads can find no anchorage or mooring place until the roads are reached. In order to give vessels which are making this run the information necessary to enable them to determine whether to lie up at Blacktoft or to continue on their voyage to Hull, tide boards are exhibited at Whitgift above Blacktoft and at Blacktoft itself showing the height of the water in a convenient way to passing vessels. There is also a similar tide board at Brough on the Upper Humber about a mile or so above where the Middle Whitton lightship was lying on June 27. In addition to this information the Hull Conservancy Board are in the habit of publishing charts of critical portions of the channel showing soundings obtained by them and delineating the shoals and the positions of the various floats, buoys and lightships. No attempt is made by the Board in the placing of these marks to define the side limits of any particular channel. Indeed the ships, floats and buoys are sometimes placed on alternate sides and sometimes on the same side of the navigable channel according as it may become more or less imperative to guard any particular shoal. But whilst making no attempt to define the width and extent of any particular portion of the navigable channel, the Board are accustomed to assist navigators by drawing course lines on their charts to indicate what they suggest to be a safe line where the deepest water available may be expected. Furthermore, the Board from time to time take it upon themselves to issue notices to mariners advertising new or special dangers which have come to their notice, or warning navigators of changes contemplated in the positions of the various sailing marks. Sometimes the notice takes the form of a warning that the marks are going to be moved. At other times it is a notification that alterations have been effected. Where the Board conceive it to be important, the nature and extent of the moves are advertised with great precision and the positions freshly adopted are precisely described. An excellent example of the care taken in this regard is furnished by the notice to mariners of June 29, 1936, where the exact position of the sunken *Neptun* with its mark lights is most precisely defined, and the moves consequent upon the disturbance of the channel caused by this wreck are advertised at length.

With this class of information at his disposal the pilot of the *Neptun*, Mr. Fielder, made his calculations as to the practicability of taking the *Neptun* on a single tide from Goole to Hull. The tide upon which he could reckon was a neap tide which would give him at high water at Brough a maximum of 15 ft. 10 ins. The draught of the *Neptun* upon which he made his calculation was a draught of 15 ft. 4 ins. upon an even keel. He did not leave Goole until 12.20 P.M., so that he could not count upon, and did not reckon that he could get the advantage of, the full high tide at Brough. His calculation was that, if he got a reading of 13 ft. at Blacktoft, he would get 13 ft. 9 ins. to 14 ft. at Brough, and that his course readings between the Middle and the Lower Whitton lightships showed a minimum of 3 ft. of water at low water ordinary springs, so that he would find at the critical time between these ships a minimum of 16 ft. 6 ins. to 16 ft. 9 ins. whilst negotiating that channel.

He was well aware that as the tide was running out during the whole of his down river journey he would be losing some inches of water even between Brough and the Middle Whitton lightship, but he counted that upon the figures which he could reasonably expect he would have a margin of something between 1 ft. 2 ins. and 1 ft. 6 ins. at the worst point of the transit.

It is worthy of remark that it is no part of the case for the defendants that the pilot acted with negligence in proceeding as he did; but it is also interesting to observe that upon a table of vessels piloted by Mr. Fielder between May 27 and June 27, amounting in all to some twenty-six ships, the *Neptun* was the one which enjoyed the unenviable distinction of having the lowest margin of difference between draught and tide. To put it in another and perhaps fairer way, the *Neptun* was the boldest of Mr. Fielder's decisions during that particular month.

The plaintiffs put their case upon a variety of grounds, including contract, breach of duty and breach of warranty, and negligence. Mr. Carpmael in argument did not, as I understood him, abandon any of these grounds; but the main portion of the plaintiffs' attack was concentrated on what to my mind is the best, as it is also the most familiar, ground that it was the duty of the defendants as a buoyage and beaconage authority to exercise reasonable care in the performance of their functions as such authority. The attitude adopted by the defendants on the whole subject of their duties and obligations was vacillating and unsatisfactory. At one time I understood Mr. Pilcher to contend that owing to the obscurity of the Acts of Parliament whereby the duties of a beaconage authority were conferred upon the Board it was impossible to place upon the Board any definite duties or obligations whatsoever. Indeed he did not shrink from the absurdity that the Humber Conservancy Board had been performing their functions for upwards of thirty years without troubling to discover what were the duties and obligations which the discharge of these functions imposed. At long last, in a final reply which was really rendered necessary by the obscurity which the Board had voluntarily flung about their own legal position, I obtained from Mr. Pilcher this grudging admission: "I acknowledge a duty of taking reasonable care "in the positioning of my lightships, and in the publication of "soundings in so far as they relate to the day upon which "they are issued."

Although it may be difficult to find neat and precise legal terms to define the obligations of the Board, I have personally very little doubt as to what is the extent of their legal duty. In a careful and most helpful argument Mr. Carpmael traced through a clear line of authority the extent of the duty of public authorities such as these.

The only real difficulty springs from the fact that it is apparently impossible to find a reported case in which either the practical obligations or the legal duties of a buoyage and beaconage authority have been laid down or defined. All the familiar authorities, such as *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1); *The Moorcock* (2); *Queens of the River Steamship Co.* v. *Conservators of the River Thames* (3), deal with either other kinds of public authorities or with a private person such as a wharfinger. Similarly, what I may call the land cases, such as *Sheppard* v. *Glossop Corporation* (4) and *Penny* v. *Wimbledon Urban District Council* (5), are not in point, although useful expressions of opinion may be drawn from these decisions. It is, of course, important to remember, as Mr. Pilcher quite properly pointed out, that the Humber is a navigable highway and that the Conservancy Commissioners, of whom the Board are the lineal legal descendants, neither had nor have transmitted to the Board any duty to make or maintain the channels of the river. It is important not to lose sight of the fact that this is a river with a natural bed of sand, and not a navigational channel which is artificially maintained by dredging and advertised as such by an authority who thereby take upon themselves consequent duties and obligations. Moreover, it is to be remembered that this case has been

(1) L. R. 1 H. L. 93.
(2) 14 P. D. 64.
(3) 22 Times L. R. 419.
(4) [1921] 3 K. B. 132.
(5) [1899] 2 Q. B. 72.

pleaded on the footing that the duty which the Board owes to the plaintiffs springs from the fact that the Board are constituted and act as the buoyage and beaconage authority for the Humber. To my mind this is the proper way in which the case should have been pleaded, and sets forth the real ground, if any, upon which the plaintiffs could recover. I have accordingly approached the case entirely upon this footing, and if I am right in this approach I do not think that it presents any serious difficulty from the legal point of view.

The Humber Conservancy Board are entitled to levy and do levy tolls in respect of their work as a buoyage and beaconage authority. Their position vis-à-vis people who pay these tolls is not to my mind affected by the fact that only part of the dues or rates so collected is levied in respect of their capacity as a buoyage authority. Once it is established that they are an authority with power to take dues, which they have exercised in the particular case under consideration, I cannot see that their consequent legal duty is any different in quality to that of a harbour authority or any other public board exercising similar functions. The clearest statement of the law applicable to this case which has been cited to me is to be found in a judgment of Lord Wright when he was a judge of the King's Bench Division in *St. Just Steamship Co., Ld.* v. *Hartlepool Port and Harbour Commissioners.* (1) Wright J. said: "In those circumstances the law is now well "established. The liability of the Commissioners in such a "case does not directly depend upon the terms of the private "Act. It depends on the special relations arising de novo "as each ship enters the jurisdiction of the port, and it is "a duty which had been very clearly expressed in a number "of cases which is said to be analogous to the ordinary "common law duty existing as between invitor and invitee; "and it has been clearly expressed in the well known case of "*Mersey Docks and Harbour Board Trustees* v. *Gibbs* (2)." The case under Lord Wright's consideration was that of a harbour authority with a duty to make and maintain. To the extent, therefore, that a different scope of practical

(1) 34 Ll. L. Rep. 344, 348.

(2) L. R. 1 H. L. 93.

obligation was in contemplation, the case differs from the one which I have to consider. But the nature of the legal duty apart from the scope of its practical obligation seems to me to be precisely the same. The navigable highway of the Humber is open to the public, but the Board, by undertaking the duties of the buoyage and beaconage authority and taking dues from vessels using the highway, enter into just such a special relation as Lord Wright described in the passage cited. It cannot be stated exactly as being a relation of invitor and invitee, since it is difficult to imagine the Board extending to the public an invitation to use the highway which ex concessis is already their legal right. Nevertheless, as Lord Wright points out, the common law duty is the same as that owed by an invitor to an invitee, and it is not necessary to invent any particular single term to indicate the relationship between a public custodian and an individual who pays for the use of the work performed by such a custodian. By an agreement scheduled to the Humber Conservancy Act, 1868, and by s. 4 of the same Act, the Humber Conservancy Commissioners were granted a lease for 999 years of the foreshores and bed of the River Humber, and Mr. Pilcher did not dispute that by subsequent enactment the Board were properly vested with the same property in the foreshores and bed of the river and were in occupation thereof with such duties as appertained to proprietors. In the circumstances the legal duty imposed on the Board seems to be no more and no less than that laid down by the Lord Chancellor in *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1): "The common law in such a case imposes a duty upon the "proprietors to take reasonable care, so long as they keep "it open for the public use of all who may choose to navigate "it, that they may do so without danger to their lives or "property." It remains perhaps to outline briefly the scope of the obligations of a buoyage and beaconage authority. For this purpose I have relied upon the services of the Elder Brethren. Neither they nor myself would wish this short schedule of duties to be considered as necessarily exhaustive,

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(1) L. R. 1 H. L. 93, 122.

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but, in the complete absence of any assistance in this matter such as I should have expected to have received from the Humber Conservancy Board, it has become necessary to lay down what I conceive to be a minimum of their obligations. A fair and useful method of approach to this subject seemed to me to be to ask my advisers what they, as experienced shipmasters entering the Humber without knowledge of its channels, would expect at the hands of the buoyage and beaconage authority appointed to lay down the marks for the navigation of the river. Speaking as shipmasters, and incidentally also as persons with no small knowledge of the special work connected with buoyage and beaconage, they tell me that they would expect as follows :—

(1.) That the authority should have sounded and found the best navigable channel in the river.

(2.) That having found it the authority should have placed sea marks of the nature of lightships, floats or buoys in the positions where they would be of the best advantage to navigation.

(3.) That by night such sea marks should be provided with adequate lights to enable the channel to be easily found and properly kept by a vessel using it.

(4.) That the authority had re-sounded the channel as and when opportunity presented itself.

(5.) In view of the quickly shifting character of the river bed, that the authority had kept a vigilant watch upon the changes in the river bed and had altered, moved or renewed the sea marks in accordance with the changes ascertained.

(6.) That records of the changes both in sounding and in movement of the marks should have been preserved for future reference and for the guidance of subsequent officials.

(7.) That the authority should publish as conspicuously as possible such further information as would supplement the guidance given by sea marks.

For my part I accept unhesitatingly this comparatively short list of expectations as a fair statement of the minimum duties of a buoyage and beaconage authority upon a great and busy highway, such as the Humber, and if one adds, upon the authority which I have quoted, that the Board should exercise reasonable care in the performance of all these duties, I am of opinion that the legal position of the Humber Conservancy Board vis-à-vis the plaintiffs is defined with sufficient accuracy for present purposes.

It is only fair to Mr. Carpmael, who gave me so much assistance upon this part of the case, to say that he relied also upon the contract or implied contract between his clients and the Board. For my part I have some difficulty in implying any contract between a public authority which levies dues and an individual who only becomes liable to pay them upon exercising his undoubted right to pass over the navigable highway. I cannot think, however, that the point is one of any substantial importance since Mr. Carpmael does not claim that, even if it could be viewed as a matter of contract, the duty could be stated more highly against the defendants than a duty to use reasonable care in the discharge of their obligations.

The attack which was launched by the plaintiffs, though it necessarily occupied some time in its development, was really concentrated upon very few lines. Their chief complaint was based upon information and charts published and circulated by the Board from time to time. It was proved that the Board from time to time exhibited plans at their office indicating that a minimum depth of three feet was available at low water ordinary spring tides throughout the Whitton channel. It was further proved that from time to time the Board issued notices to mariners indicating that only one foot of water was for the time being available between two or more of named marks in the channel. Their case was that the publication of this information constituted a representation to all using the channel that there was at all times a minimum depth of not less than three feet of water at low water ordinary spring tides throughout the Whitton channel and raised a warranty that, whenever no notice to the contrary had been issued, a depth of three feet could be relied on throughout the channels. They further claimed that it was a breach on the part of the Board of their duty or contract to exercise reasonable care, that they allowed an obstruction, sand-bank or hummock, giving a sounding of less than three feet at low water ordinary spring tides to exist in the Whitton channel. Another line of attack was that the Middle Whitton and Lower Whitton lightships were negligently placed in such a way as not to indicate the best water in the channel, but to indicate a course between the lightships which would take vessels following such a course over a patch of sand which would give a sounding of not more than one foot at low water ordinary spring tides. In the course of developing this attack the plaintiffs brought evidence which attempted to show that the officials of the Board had been negligent both in their system of taking soundings and in the conduct of the actual operation of sounding, and it was suggested that the Board had arrived at a hasty and ill-considered decision in the placing of the respective lightships.

None of these lines and points of attack was unworthy of careful consideration except perhaps the last. As I listened to Mr. Carpmael's final indictment against the Board I began to wonder whether any buoyage authority could ever hope to stand up under such an exacting standard of criticism. It was in evidence and not disputed that these channels can change their character altogether in the course of a single month. Indeed the charts before me show that some of the very points where the best water was available on June 27 were points of danger showing dry soundings on May 27. In a very short while after the disaster which befell the *Neptun* the whole channel changed from the Yorkshire to the Lincolnshire side of the river, and vessels were diverted some half-mile to the southward to pass south of Read's Island. In a channel showing such bewildering mutability it seems obvious that not only quick decisions but speedy action must be imperative, and on the day in question when hasty action was suggested, such changes had taken place that it had been necessary to take a fresh set of soundings over practically the whole of the Whitton channel and to decide upon the evidence thereby obtained whether to move, where to move, and when to move, the respective lightships. Moreover, it must be borne in mind that soundings can only be taken within two hours before and two hours after high water and the staff of the Board cannot in the nature of things be unlimited. The individual who superintended the taking of the soundings had to plot these soundings on his return to his office, and to confer with his chiefs and offer his practical advice upon the positioning of the lightships. For my part I cannot see that the officials of the Board who were responsible for the work of June 26, 27, and 28, could possibly have acted with any greater deliberation and better judgment than they did when one bears in mind the imperative necessity of dispatch.

Passing now to a major point of attack—that of alleged warranty of a minimum of three feet at low water ordinary spring tides in the Whitton channels. The plaintiffs were obliged to concede that in no published document, nor in any chart inspected in any office belonging to the defendants, has there ever been any direct representation either amounting to warranty or not as to the existence of a minimum of three feet in the Whitton channel. The representation or warranty therefore has to be implied from the documents and information published. It is true that over a period of more than fifty years the defendants have striven with success to provide a channel having a minimum depth of three feet at low water ordinary spring tides. When I say that they have striven with success, that is only to say that they believe that they have succeeded; but one cannot shut one's eyes to the possibility that the channels may have shoaled more quickly than they knew, and there may have been times when they believed the minimum depth to be still subsisting, when there was in fact something less. The last chart which had been published showing the soundings in the channel before June 27 was a chart bearing date May 27, and indicating a course line for ships between the Middle Whitton and Lower Whitton light-vessels which, if adhered to, would take the ship over depths showing a minimum of three feet. The Board placed great reliance in their defence on the fact that this and every other chart accepted by them bore the following words on its left-hand corner: "The Humber "Conservancy Board give notice that whilst every care is "taken in the preparation of this chart, they do not accept "responsibility for any inaccuracy therein." In the view put forward by the defendants the chart was merely a representation of the soundings found in the channel for the day upon which it was exhibited, and the words of limitation in the corner exempted them from any liability arising from representations upon the chart. I have not troubled to consult possible lines of authority upon the significance of the words of exception on the chart, and it may be, therefore, that there is more to be said for this point than I have for my part imagined. If it was intended to exempt the Board by these words from any liability which could attach to persons relying upon the chart, the phrasing seems to me to be singularly unhappy. As I understand the English language the word "inaccuracy" is intended to denote a minor form of error. It is hardly the apt word to suggest that the whole of the information contained upon the chart may be erroneous and that the Board accept no kind of responsibility for the intelligence so furnished. I have not paid much attention to this point because it does not appear to me that the publication of the chart forms any kind of basis for the representation or warranty suggested. It is common knowledge on the part of all persons who are accustomed to use the waters of the Upper Humber that the channels change with the bewildering rapidity which I have already described, and the mere fact that the Board attempt to assist mariners by issuing a chart marked to a given date does not to my mind raise any presumption that the Board thereby represents or warrants that this changing bed of the river has reached a static stage and will continue to show the depths indicated on the chart. As I have already noted, the Middle Whitton light-vessel was changed three times in the month of June before the accident to the *Neptun*, a fact which was in itself an abundant advertisement to pilots and other regular navigators of the river that the depths shown upon the chart of May 27 could no longer be relied on.

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In order to construct their representation or warranty the plaintiffs attempted to combine the issue of such charts as that of May 27 with a few notices to mariners to the effect that in certain places indicated in the notices only one foot of water was available. These notices were explained by the Board's officials as being issued on occasions when a bank of sand had been observed across the whole of the navigable channel constituting, as they saw it, a bar or obstruction. I am quite unable to see how the publication of these notices, either taken alone or in conjunction with the information conveyed upon the charts, can be taken to be a representation that a minimum of three feet existed in the channels, which are quite undefined as regards their lateral extent, on any given day. I can quite believe that because the Board have worked industriously throughout their whole legal life to supply a channel containing not less than a three feet minimum the idea has grown up that the three feet is always there. It may even be conceded that this idea has been fortified by the issue of notices at times when a bar of one foot from side to side of these undefined channels has been perceived. But in order to make the Board responsible for the results of the growth of such ideas it would require some far more tangible representation upon their part as to the existence of a minimum depth than can be deduced from these shadowy implications. I hold, therefore, that no ground exists for suggesting that the Humber Conservancy Board either impliedly represented or warranted that there was a minimum depth of three feet of water in the Whitton channels on June 27, 1936.

I must turn now to some of the less important lines of attack. First amongst these is the impeachment of the Board's practice and performance in the matter of taking soundings. In order to found their case more securely against the Board the plaintiffs offered evidence from a hydrographical expert, Captain Gibson. Objection was taken by Mr. Pilcher, on behalf of the Board, to this evidence on the ground that the Elder Brethren were sitting to assist me upon all technical

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matters. It is, I think, a little important that no obscurity should exist concerning the status and functions of the technical advisers to the Admiralty Court. The Trinity Masters who assist us are men specially selected as representative heads of their profession. It is no small honour to be invited to join the Trinity House as an Elder Brother, and this Court rightly places the greatest reliance upon their assistance and advice. But highly skilled as they are, and probably just because they are highly skilled, the Elder Brethren have never professed to be experts in every branch of nautical science. The present instance affords a good example of a case in which special knowledge may well be in advance of the general information possessed by individual Trinity Masters. Before ruling upon this point I consulted the Elder Brethren as to whether a skilled hydrographer such as Captain Gibson, with a record of survey work both practical and theoretical extending over a period of upwards of thirty years, would be likely to add to their own personal knowledge of the subject. Both the Trinity Masters answered this question unhesitatingly in the affirmative, and I am happy to think that they were not disappointed with Captain Gibson's contribution. Shortly stated, Captain Gibson's evidence was a criticism of the Board's work in three respects. [The learned judge then dealt with the evidence of Captain Gibson as compared with the evidence given by the defendants' witnesses and expressed his preference in favour of the latter.]

Having dealt with the plaintiffs' claim it is not, of course, a duty which lies upon me to discover the circumstances under which the *Neptun* came to be lost, and still less have I any duty to assess the actual responsibility for this disaster. Having regard, however, to the great detail with which the matter was contested before me, and in view of the fact that the case might go higher, it would perhaps serve a useful purpose that I should state the view which I have formed as to the causes of this casualty. [His Lordship then expressed the view found by himself and the Elder Brethren as to the cause of the casualty, which, in a sentence, was "a

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"combination of poor judgment and misfortune."] The action must be dismissed, with costs.

Solicitors for plaintiffs: *Botterell & Roche, for Hearfield & Lambert, Hull.*

Solicitors for defendants: *Pritchard, Sons, Partington & Holland, for Andrew M. Jackson & Co.*

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27, 30;
Dec. 1, 20.

Shipping—Collision in the Thames—Vessel at anchor in improper position athwart fairway—Lights of anchored vessel seen in sufficient time to avoid collision—Failure to appreciate that lights were anchor lights in sufficient time to avoid collision—Contributory negligence—Rule in Davies v. *Mann.*

The plaintiffs' vessel *C.* at anchor in Long Reach, River Thames, was run into by the defendants' vessel *E.* proceeding up the river. The *C.* had her anchor lights exhibited, but she was lying nearly athwart the river with her whole length to the north of mid-channel in such a position that she was obstructing a large part of the fairway. The practice in Long Reach, according to the evidence, was for vessels to anchor to the south of mid-channel, and for large vessels proceeding up and down to pass to the northward.

The defendants' case was that the *C.'s* lights were defective, and that those on the *E.* only saw the dim forward anchor light, and immediately afterwards the hull, of the *C.* about 650 feet away. The Court found, however, that the lights were effective and that they were, or should have been, seen at a considerably greater distance than 650 feet; but that the failure of those in charge of the *E.* to identify the lights as anchor lights in time to avoid the collision was partly due to the *C.'s* improper and unexpected position in the river in a locality where bright lights on the north shore would probably make it more difficult to pick up her lights, and partly to the fact that those on the *E.*, which had a speed of at least ten knots, were not sufficiently alert as to the possibility of danger ahead. On these findings Bucknill J. held both vessels equally to blame.

On appeal:—

Held, that the case did not come within the *Davies* v. *Mann* (1842) 10 M. & W. 546, rule; that the *E.* was to blame, inasmuch as those in charge of her on seeing the lights should have realized the possibility that they were those of a ship or ships ahead, the precise position of which was obscure, and should have reduced the speed of the *E.* immediately; but that the *C.* was also negligent for remaining in an improper position athwart the fairway, and that this negligence, which continued up to the time of the collision, contributed to the failure on the part of the *E.* to take proper action; that the negligence of both vessels therefore contributed to the collision and that both were to blame in equal degrees.

Decision of Bucknill J. [1937] P. 167 affirmed.

Appeal and Cross-appeal in an action of damage.

The plaintiffs (appellants) were the owners of the steamship

Corstar; the defendants (respondents and cross-appellants) were the owners of the steamship *Eurymedon*. The collision occurred on the early morning of January 6, 1937, in Long Reach of the River Thames.

The plaintiffs' case was that the *Corstar*, a steamship of 2337 tons gross, 300 feet long, was lying at anchor to the southward of mid-channel; the wind was S.S.W., strong, and being wind-rode, the *Corstar* was angled about 3 to 4 points to starboard of a down-river heading. The tide was the last quarter flood. The regulation lights for a steamship at anchor were duly exhibited and burning brightly. In these circumstances the masthead lights and the red light of the *Eurymedon*, coming up river in about mid-channel, were observed distant about a mile and bearing a little on the port bow. Instead of passing all clear to the northward, however, the *Eurymedon* came on and swinging rapidly to starboard at the last with her port quarter struck the port quarter of the *Corstar*, doing damage.

According to the defence, the *Eurymedon*, a twin-screw motor vessel of 6224 tons gross, bound from Amsterdam to London, part laden, was on an up-river course, to the northward of mid-channel, with engines working at half-speed ahead, when a dim white light, which proved to be the forward anchor light of the *Corstar*, was seen distant about a cable or a little more and bearing about 1 to 1½ points on the port bow. Almost immediately afterwards the outline of the *Corstar* was made out lying athwart the river right across the head of the *Eurymedon*, and a very dim white light was also made out aft on the *Corstar*. Engine and helm action were taken immediately, but in spite of these manœuvres it proved impossible to prevent the port side fouling the stern of the *Corstar*, and at the same time the starboard bow of the *Eurymedon* came into contact with the starboard side of the steamship *Corchester*, which was lying at Cory's jetty on the north side of the river.

The defendants alleged that those in charge of the *Corstar* failed to exhibit anchor lights of sufficient brightness; that they failed to anchor on the south side of the river, and caused

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or allowed the *Corstar* to lie athwart the fairway and in a position where her lights were liable to be confused with surrounding shore lights.

Bucknill J. for the reasons summarized in the headnote and fully set out in the judgments, found both vessels to blame in equal degrees.

The plaintiffs appealed and the defendants cross-appealed.

K. S. Carpmael K.C. and *Owen L. Bateson* for the appellants. The *Corstar* may have been anchored in an unusual position, but she had proper anchor lights, and there is no by-law prohibiting vessels from anchoring in the fairway. In view of the finding that if proper care had been taken on board the *Eurymedon* the lights should have been seen in ample time to avoid collision, the previous negligence, if any, of the *Corstar* is immaterial; the *Eurymedon* is alone to blame on the principle laid down in *Davies* v. *Mann* (1) and restated in *The Volute.* (2)

[SLESSER L.J. referred to *Butterfield* v. *Forrester.* (3)]

But for the bad look-out on the *Eurymedon* and her excessive speed, whereby she could not stop in time, the accident would not have happened: see also *Baker* v. *E. Longhurst & Sons* (4); *McLean* v. *Bell* (5); *Cayzer* v. *Carron Co.* (*The Margaret*) (6); *Swadling* v. *Cooper* (7); *Hillem* v. *I. C. I.* (*Alkali*), *Ld.* (8); *Tuff* v. *Warman* (9); *British Columbia Electric Ry. Co.* v. *Loach.* (10)

There was ample room for the *Eurymedon* to pass the *Corstar* without touching her, and the facts, except that there was no fog, are very similar to those in *Kantarah* v. *Samurai.* (11) The *Corstar*, being at anchor and exhibiting proper lights, the burden of proof is on the *Eurymedon*: *The Batavier.* (12)

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(1) 10 M. & W. 546.
(2) [1922] 1 A. C. 129, 136.
(3) (1809) 11 East, 60.
(4) [1933] 2 K. B. 461.
(5) (1932) 147 L. T. 262.
(6) (1884) 9 App. Cas. 873.
(7) [1931] A. C. 1.
(8) [1934] 1 K. B. 453.
(9) (1858) 5 C. B. (N. S.) 573.
(10) [1916] 1 A. C. 719.
(11) (1920) 5 Ll. L. Rep. 333.
(12) (1845) 2 W. Rob. 407.

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[SCOTT L.J. referred to Marsden's Collisions at Sea, 9th ed., p. 40.]

The *Eurymedon* had the last opportunity of avoiding the collision; her pilot himself said that if he had seen the anchor lights of the *Corstar* sooner (as on the finding of the learned judge he ought to have done) he would have avoided her. The primary object of placing a look-out man is to pick up "unexpected" lights. In *Davies* v. *Mann* (1) nothing could have been more "unexpected" than a hobbled donkey.

[Reference was also made to *Mersey Docks Trustees* v. *Gibbs* (2); *Mayor of Colchester* v. *Brooke* (3); *H.M.S. Sans Pareil* (4); *The Margaret* (5); *The Monte Rosa* (6); *The Cachapool* (7); *The Highland Loch* (8); and *Heaven* v. *Pender.* (9)]

H. G. Willmer and *Vere Hunt* for the respondents and cross-appellants. The *Corstar* was allowed to lie in a position in which the lights could not be seen earlier than they were seen, and the pilot of the *Eurymedon* was mistaken when he said that he thought he would have seen the lights sooner if they had been brighter. The vice of the *Corstar's* position was that having anchored in an improper position she was allowed to swing athwart the fairway and remain there. She was in a locality where, as the learned judge found, "visibility "is known to be made more difficult by the glare of the shore "lights"; and no ordinary prudent seaman would take the lights, when he did pick them up, to be those of a large vessel anchored in such a position. The *Corstar* was calling on vessels to exercise more than ordinary care, as is shown by the fact that four other vessels had to take late and drastic action to avoid her. The duty imposed by good seamanship is to exercise ordinary and not extra-ordinary care, and under the circumstances the *Eurymedon* was not negligent. Once the

(1) 10 M. & W. 546.
(2) (1866) L. R. 1 H. L. 93.
(3) (1845) 7 Q. B. 339, 376.
(4) [1900] P. 267.
(5) (1881) 6 P. D. 76.
(6) [1893] P. 23.
(7) (1881) 7 P. D. 217.
(8) [1912] A. C. 312.
(9) (1883) 11 Q. B. D. 503, 508.

cause of her ignorance as to the *Corstar's* position is ascertained, most of the cases cited by the appellants are immaterial. This is not a *Davies* v. *Mann* (1) case. The question to be decided is that put by Humphreys J. in *Swadling* v. *Cooper* (2): "Whose negligence was it that substantially caused the accident?"

Putting the case at its worst against the *Eurymedon* and assuming that she is in some degree to blame, the collision was substantially caused by the negligence of the *Corstar*, negligence which continued right up to the time of the collision. Apparently unaware, owing to the defective anchor watch, that she was athwart the fairway, she was allowed to remain there and had "the last opportunity" of avoiding the collision quite as much as the *Eurymedon* had. The *Corstar* had a continuing duty throughout the night to get out of the position in which she was and an imperative duty to do so when the lights of the *Eurymedon* were seen. It was stated that steam had been maintained, and, if so, the *Corstar* could have moved. If, on the other hand, and the evidence is not quite clear on the point, the engines were not absolutely ready for immediate use, they ought to have been ready, and on that assumption, having placed it beyond her power to move, the *Corstar* is to blame on the principle stated in *British Columbia Electric Ry. Co.* v. *Loach*. (3)

[Slesser L.J. referred to *Radley* v. *L. & N. W. Ry. Co.* (4) and Salmond on Torts, 8th ed., p. 485, on the rule in *Davies* v. *Mann.* (1)]

It is conceded on behalf of the *Eurymedon* that, if in fact those on board were aware of the exact position of the *Corstar* in ample time to avoid her without difficulty, the principle stated in *Davies* v. *Mann* (1), and the line of authorities following that case, would apply.

Carpmael K.C. replied.

Cur. adv. vult.

1937. Dec. 20. The following judgments were read:—

(1) 10 M. & W. 546.
(2) [1931] A. C. 1, 11.
(3) [1916] 1 A. C. 719.
(4) (1876) 1 App. Cas. 754.

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GREER L.J. Shortly after 6 A.M. the plaintiffs' steamship *Corstar* and the defendants' steamship *Eurymedon* came into collision in Long Reach of the River Thames. Bucknill J. held both vessels to blame, and apportioned the damages equally. The owners of the *Corstar* appeal on the ground that the negligence of those on board the *Corstar* was not a contributing cause of the collision, because those in charge of the *Eurymedon* saw, or ought to have seen, her riding lights in time to take action to avoid colliding with her. The owners of the *Eurymedon* cross-appeal on the ground that the sole cause of the collision was the negligence of the *Corstar*.

The material facts proved and the findings of the learned judge are summarized in a very clear judgment, and I find it unnecessary to repeat them in my judgment. I read the judgment as meaning that those in charge of the *Eurymedon* saw the riding lights of the *Corstar* earlier than they said in their evidence, but that they did not identify them as the lights of a vessel at anchor because they were not expecting to see a vessel anchored in the position in which the *Corstar* had been put and allowed to remain. I think the learned judge found the *Eurymedon* partly to blame on the ground that seeing the lights, and not knowing what they indicated, those in charge of the *Eurymedon* should have reduced her speed. The learned judge in his judgment says: " The first question "which I now have to consider is whether the *Eurymedon* was "negligently navigated. The conclusion to which I have come "is that the failure on the part of those in charge of the "*Eurymedon* to identify the anchor lights of the *Corstar* as "such in time to avoid a collision with her was partly due to "the *Corstar's* unusual and improper, and therefore unexpected, "position in the river, and also was partly due to the fact that "those on board the *Eurymedon*, as they approached the place "of collision, were not sufficiently alert to the possibility of "danger ahead and did not take proper action to reduce their "speed in due time. I doubt whether I have heard from the "*Eurymedon* a complete account of the observations made on "board her with reference to the *Corstar's* lights. The conclu-"sion I have come to after hearing all the evidence is that those "in charge of the *Eurymedon* became aware, or should have "become aware, of white lights ahead which proved to be "those of the *Corstar* at a distance greatly in excess of 650 feet, "and in ample time to avoid a collision with her, and that "they did not take any action until the hull of the *Corstar* "was sighted at about 650 feet because they did not realize "until they saw the hull that the lights were the riding lights "of a vessel at anchor athwart the fairway."

"On seeing these lights, I am advised that those in charge "of the *Eurymedon* should have realized the possibility of a "ship or ships ahead the precise position of which was obscure, "and should have made a reduction of speed immediately."

I entirely agree with this decision as to the fault of the *Eurymedon.*

The learned judge's decision with regard to the negligence of the *Corstar* is stated as follows (1): "In my view, and in this "also I am supported by the advice of the Elder Brethren, "those in charge of the *Corstar* were lacking in good seamanship "in allowing her to lie athwart in the river in this place, "and at this time in the position as found by me. The fact "that the master and the chief officer of the *Corstar* have "denied that their ship ever got into this position indicates "what their own opinion on this point is. If they had taken "any care to ascertain their position at anchor, which I think "they did not do, they would have known that the vessel, "under the prevailing conditions of wind and tide, would be "lying athwart the fairway on the last of the flood, and at a "time when vessels would be coming up and down river, and "that they would be an obstruction to them as well as being "in a very unusual position. There was no necessity whatever "for the *Corstar* to be there, and after those in charge of her "became alive to her position they moved away to a proper "anchorage on the south side of the river. The *Corstar* had a "very indifferent anchor watch, a man who apparently did "not realize that the vessel was athwart the river. In my "view the conduct of those in charge of the *Corstar* in lying in "this position was negligent. They were behaving in such a

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(1) [1937] P. 176.

"way as to make a collision probable with vessels proceeding "up or down the river, and their conduct was not caused by "any necessity but merely by lack of good seamanship and "failure to take ordinary precautions to avoid risk of "collision."

That those in charge of the *Corstar* were guilty of great negligence in so anchoring their ship as to allow her to get into the position athwart the fairway cannot be disputed. But the learned judge had to deal with the contention put forward on behalf of the *Corstar* that the negligence referred to was not a contributing cause of the collision because those in charge of the *Eurymedon* could by the exercise of reasonable care have avoided colliding with the *Corstar*.

The learned judge deals with the question in the words following (1): "The third issue that arises is whether, assuming "the position of the *Corstar* was improper and that those in "charge of her were guilty of negligence in allowing her to get "in that position, such negligence contributed to the collision, or "whether the principle laid down in *Cayzer* v. *Carron Co.* (2) "applies. In my view that issue depends to some extent "upon the question whether the negligence of the *Corstar* in "taking up that position contributed to the failure of those in "charge of the *Eurymedon* to take appropriate action to "avoid a collision until they were too close to clear her and the "*Corchester*."

"If these incidents had occurred by day and those in charge "of the *Eurymedon* had known that the *Corstar* was at anchor "athwart the fairway in ample time to avoid her without "difficulty, the fact that it was an improper place for her to "lie would clearly not have made the *Corstar's* negligence one "of the contributory causes of the collision. The knowledge "or lack of knowledge of the *Eurymedon* as to the improper "position of the *Corstar* appears to me to be a cardinal fact on "this issue as to the liability of the *Corstar*. The crucial "factor of such knowledge appears to explain the difference "between the decisions in *The Margaret* (3) and in *The Monte*

(1) [1937] P. 177.
(2) 9 App. Cas. 873.
(3) 6 P. D. 76.

"*Rosa* (1), as Lord Birkenhead pointed out in his speech in "*The Volute* (2)."

"In this case those in charge of the *Eurymedon* did not "appreciate the fact that the *Corstar* was at anchor until it "was too late to avoid her. I have already decided that the "*Eurymedon* was to blame for not taking earlier action by "reducing speed, but the negligence of the *Corstar* in allowing "herself to get into an improper position does seem to me "to be wrapped up with and part of the negligence of the "*Eurymedon*. To quote the words of Lord Birkenhead in "*The Volute* (3): 'In the ordinary plain common sense of the "' business' the *Corstar* 'has contributed to the accident by "' her negligence.' I therefore find both vessels to blame."

I understand the judge's decision to be that the failure of those in charge of the *Eurymedon* to identify the *Corstar* as a vessel at anchor in the fairway was in part caused by the negligence of those in charge of the *Corstar* in so anchoring her that she got into and was allowed to remain in a position in which no vessel navigating the Long Reach would expect her to be, and caused those on the *Eurymedon* to fail to identify the meaning of her lights. Having regard to the express findings of the learned judge, I do not feel it necessary to consider in any detail the numerous cases cited to us by Mr. Carpmael for the appellants. I think the judge's finding both vessels to blame was in accordance with the evidence, and his judgment ought not to be disturbed.

I think the law arising out of what is usually called the *Davies* v. *Mann* (4) principle may be stated as follows :—

(i.) If, as I think was the case in *Davies* v. *Mann* (4), one of the parties in a common law action actually knows from observation the negligence of the other party, he is solely responsible if he fails to exercise reasonable care towards the negligent plaintiff.

(ii.) Rule No. (i.) also applies where one party is not in fact aware of the other party's negligence if he could by reasonable care have become aware of it, and could by exercising reasonable care have avoided causing damage to the other negligent party.

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(1) [1893] P. 23.
(2) [1922] 1 A. C. 129, 137.
(3) [1922] 1 A. C. 129, 145.
(4) 10 M. & W. 546.

(iii.) The above rules apply in Admiralty with regard to collisions between two ships as they apply where the question arises in a common law action.

(iv.) But if the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both.

(v.) If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made, then both are equally to blame.

In my judgment the present case comes within the fourth and fifth rules above stated. Rules i. to iv. have been established beyond question by the long line of cases cited by Mr. Carpmael for the appellants.

There has been no case before the present expressly based on rule v. But I think rule v. is a necessary corollary to rule iv., and it is impliedly involved in the decision of the Court in *Dowell* v. *General Steam Navigation Co.* (1), which was approved in *The Volute* (2), in the decision of the Privy Council in *British Columbia Electric Ry. Co., Ld.* v. *Loach* (3), and in the decision of the House of Lords in *Swadling* v. *Cooper.* (4)

For these reasons I think that the decision of Bucknill J. was right, and this appeal should be dismissed with costs.

SLESSER L.J. In this case, which has arisen out of a collision between two vessels in the Long Reach of the Thames shortly after 6 A.M. on January 6, 1937, it is not disputed that the *Corstar* at the time of the casualty was at anchor, and the learned judge has found that those in charge of her were lacking in good seamanship in allowing her to lie athwart the river in a very unusual position ; improper and dangerous from the point of view of traffic up and down. The learned judge

(1) (1855) 5 E. & B. 195.
(2) [1922] 1 A. C. 129, 139.
(3) [1916] 1 A. C. 719.
(4) [1931] A. C. 1.

accepted the evidence of the pilots of several vessels who had succeeded, some with great difficulty, in passing the *Corstar*, that instead of complying with the practice in Long Reach of anchoring to the southward of mid-channel so that large vessels proceeding up and down river could pass to the northward, the *Corstar* was lying with her whole length to the north of mid-river and athwart the fairway in such a position that she was obstructing a large part of the fairway used by traffic up and down the river. Subject to this condemnation, the learned judge has found that the *Corstar* was exhibiting anchor lights which complied with the by-laws, and that she was not to blame in that respect, but that she was negligent in that there was no necessity whatever for her to be in that dangerous place and that she had a very indifferent anchor watch—a man who apparently did not realize that the vessel was athwart the river or take steps to prevent it. This was the negligence found on the part of the plaintiffs.

As to the defendants, the owners of the *Eurymedon*, she, the learned judge said, was negligently navigated in that there was a failure on the part of those in charge of the *Eurymedon* to identify the anchor lights of the *Corstar* as such in time to avoid the collision. The reason why they did not identify the lights until they were comparatively close to the *Corstar*, he finds, was because they were not expecting to see a vessel anchored in this position and were not looking out for or expecting to see the anchor lights of a ship lying across the fairway there. Finally, on this head, he thinks that those in charge of the *Eurymedon* became aware, or should have become aware, of the lights ahead, which proved to be those of the *Corstar*, at a distance in ample time to avoid the collision with her, and that they did not take any action until the hull of the *Corstar* was sighted at 650 feet, because they did not realize until they saw the hull that the lights were the riding lights of a vessel at anchor athwart the fairway.

The learned judge on these findings came to the conclusion that both vessels were to blame, and that the negligence of the *Corstar* in taking up her position contributed to the failure of those in charge of the *Eurymedon* to take proper action, and that this negligence of the *Corstar* was so wrapped up with and part of the negligence of the *Eurymedon* as to compel him to say that in the ordinary common sense of the business the *Corstar* contributed to the accident by her own negligence.

In these circumstances, the causal argument, not unfamiliar, but always difficult to determine, is raised by Mr. Carpmael for the appellants, the plaintiffs. He says, endeavouring to bring the case within the doctrine of last opportunity, that on the finding of the learned judge such last opportunity was with the *Eurymedon* who, had she kept a proper look-out, would have seen, or ought to have seen, the lights of the ship at anchor, and had she seen them ought to have appreciated from their presence that there was a ship athwart the fairway, in which case she could have avoided the vessel by passing her to the north of the Reach in that part of the river which was still unobstructed. He invokes the well known authority of *Davies* v. *Mann* (1) to the effect that where an accident arises through the combined negligence of two persons the liability is on him who had last opportunity of avoiding the accident.

In *Davies* v. *Mann* (1) it is not clear, as I read the case, whether the driver of the defendant's wagon which ran against the plaintiff's fettered ass did or did not see the donkey. I think from the judgment of Parke B. that it was found that he probably did so see the ass, though too late. On the other hand, in *Butterfield* v. *Forrester* (2) the plaintiff, who was riding at a time when there was light enough to discern an obstruction 100 yards distance, rode violently and did not observe it, the evidence being that if he had not ridden very hard, he might have avoided the obstruction. In the language of Bayley J.: "If he had used ordinary care "he must have seen the obstruction." As against this view, the learned judge, as I have said, in this case has found in effect that there was here such a continuing negligence on the part of the plaintiffs as to make it proper to say in the language of Lord Birkenhead in *The Volute* (3) that there does not

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(1) 10 M. & W. 546, 549.

(2) 11 East, 60.

(3) [1922] 1 A. C. 129, 145.

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seem to be a sufficient separation of circumstance between the negligent navigation of the one ship and that of the other to make it right to treat the negligence of the one as the sole cause of the collision.

In the present case the learned judge has come to the conclusion that if the *Eurymedon* had known by day that the *Corstar* was at anchor athwart the fairway in ample time to avoid her without difficulty the fact that it was an improper place for her to lie would clearly not have made the *Corstar's* negligence one of the contributory causes of the collision. But he thinks that the *Corstar* in this accident at night has contributed to the collision by being in a place so unexpected that the *Eurymedon* was not looking out for or expecting to see her anchor lights. I appreciate the difficulty which was urged upon us by Mr. Carpmael in accepting this view. Both in *Davies* v. *Mann* (1) and in *Butterfield* v. *Forrester* (2) obstructions were left in a position where they were not reasonably to be expected. Indeed, anything less likely than that a fettered ass would be found upon a highway it is difficult to imagine, and were the matter to end here I should have the greatest difficulty in coming to the same conclusion as the learned judge. *Tuff* v. *Warman* (3) supports the view that if the absence of a look-out was negligence on the part of the plaintiffs, still, if the defendants also had a look-out and nevertheless persisted in a course that would inflict an injury, they would be liable though the plaintiffs had no look-out, for that neglect of the plaintiffs would not be the direct cause of the injury, that is to say would not be a cause without which the injury would not have happened (per Wightman J.).

But in the present case there is another ground for asserting a continuing negligence on the part of the plaintiffs. In my view, the plaintiffs, by failing to prevent the vessel getting athwart the river under the prevailing conditions of wind and tide on the last of the flood, in that they had not any competent anchor watch and failed to use their engines from the time when the vessel started to go athwart as they might

(1) 10 M. & W. 546.
(2) 11 East, 60.
(3) 5 C. B. (N. S.) 573, 586.

have done, have by their own negligence denied themselves the opportunity of avoiding the accident, and this opportunity which they had prevented themselves from using (though their engines were kept handy for the tide turning and main steam had been maintained and the engineer was in charge of the engines) would, had they not been negligent, have continued throughout the night up to the time of collision. This would appear to be the effect of *Loach's* case (1), where the railway company would have had the last opportunity of avoiding the accident but for their sending out a car with a defective brake; the Judicial Committee there holding the company liable although the last actual negligence was in the plaintiff, on the ground that the opportunity which the railway company ought to have had but for their negligence must be deemed to be a continuing opportunity. Despite some doubts formerly expressed as to this case, it now appears from the speech of Lord Wright in *McLean* v. *Bell* (2) that *Loach's* case (1) is to be regarded as good law—a view with which the other learned and noble lords associated themselves.

In the result I have come to the same conclusion, though in part for different reasons, as the learned judge, that in all the circumstances of the case both parties to the action are to be held to blame.

SCOTT L.J. In my opinion this appeal should be dismissed. I agree with the conclusion reached by Bucknill J. that both vessels were to blame and I do not think we should alter his apportionment. I see no ground for thinking that in holding both vessels to blame he acted on any wrong view of the law, and I am satisfied that the evidence amply warranted his findings of fact. As has been pointed out in both the judgments already delivered, the appeal of the *Corstar* was based on the contention that the facts disclosed a *Davies* v. *Mann* (3) case, entitling the *Corstar* to a judgment that the *Eurymedon* was alone to blame.

I will state my views upon the facts before I discuss the

(1) [1916] 1 A. C. 719.
(2) 147 L. T. 262, 264.
(3) 10 M. & W. 546.

question of law. Upon most of the facts there was no dispute, but there was one question which was in direct controversy, and another which raised some degree of doubt. The controversy turned on an attack by witnesses from the *Eurymedon* upon the *Corstar's* anchor lights as being insufficiently bright to satisfy r. 14 of the Thames Bye-laws. The learned judge, however, went into the evidence with great care, believed the *Corstar's* lamp-man, who gave evidence before him, and finally disposed of the attack by holding that the *Corstar* was duly exhibiting anchor lights which complied with the by-law. That finding was not contested before us. The question upon which there was doubt was as to the time when the *Eurymedon* in fact saw the anchor lights of the *Corstar* and realized what they were and whether at that time it was still possible for her by helm and engine action to avoid a collision. The language of the judgment is not quite definite on this point, but as I read it I think the learned judge intended to find that those on the *Eurymedon* saw both the lights of the *Corstar* when the *Eurymedon* was still a considerable distance away (although he did not say how far), but he says that they did not then "identify" them. By his finding I think he meant that those responsible for the navigation of the *Eurymedon* actually saw the two lights of the *Corstar*, but did not realize that they were the anchor lights of a ship of the sort of size of the *Corstar*, lying athwart the fairway. He does not go so far as to find the *Eurymedon* guilty of a bad look-out; indeed he rather goes out of his way to minimize the blame which would normally attach to the failure to identify the lights by suggesting that it may have been due partly to the abnormal position of the *Corstar* in the river—i.e., lying right athwart the northern half of the fairway and blocking the usual route for traffic—a position where no up-coming steamer would expect an anchored vessel to be, and partly to the glare of the shore lights extending in alternating patches of light and dark along the north shore up to and past Cory's jetty. Had the learned judge definitely found that, when the *Eurymedon* was first within the range of full visibility of the *Corstar's* lights, i.e., a mile away, she then fully realized what the *Corstar's* lights were and meant, he could hardly have helped holding her alone to blame, on the reasoning of *Davies* v. *Mann* (1) and *Cayzer Irvine* v. *The Carron Co.* (2) (the second *Margaret* case). And on similar reasoning if he had found her definitely guilty of bad look-out throughout with no extenuating circumstances, and had also found that with a proper look-out she would have had ample time and opportunity to keep out of the *Corstar's* way, then again it may be that he ought to have held her alone to blame—see *Butterfield* v. *Forrester* (3), to which Slesser L.J. has referred; but he makes no such finding, nor was there, in my opinion, evidence upon which we can say that he ought to have so found. The question therefore of what legal conclusion ought to follow upon such a finding of fact does not arise.

On the evidence and on the learned judge's actual findings of fact I cannot see how he could attribute all the blame to the *Eurymedon* or avoid holding that the *Corstar* was in part responsible for the collision. As I read his judgment his conclusion was one of pure fact. From the first moment that the *Eurymedon* began to approach the *Corstar* with a view to passing up the Reach along its northern half, which the evidence showed to be the usual track of vessels in the fairway, the *Corstar's* disregard of the obligation of good seamanship (which was a merely abstract obligation as long as no ship wanted to pass) became a breach of positive duty towards the *Eurymedon*. The *Corstar* was lying in a position which was to the pilot of the *Eurymedon* so unprecedented as to be wholly unexpected; and he had been a Thames pilot for thirty years; and it struck four wholly independent pilots with similar experience in just the same way. The common-sense view of the effect of this negligence seems to me to be that it was throughout the period when the *Eurymedon* was approaching her down to the moment of impact a continuing source of embarrassment to the *Eurymedon*, and therefore of necessity a contributing factor, for which the *Corstar* cannot escape responsibility.

(1) 10 M. & W. 546.
(2) 9 App. Cas. 873.
(3) 11 East, 60.

That the *Eurymedon* was also to blame, as held by the learned judge, seems to me obvious. Even assuming, as I do assume, that he was justified in not finding her guilty of bad look-out when she first came within the minimum range of the *Corstar's* lights under the by-law—one mile—there must have been a point, much further from the *Corstar* than the 650 feet at which they began to see the loom of her hull, when those on the *Eurymedon* ought to have seen and identified her anchor lights; and from that time they came under a definite duty to take helm and engine action in order to avoid or minimize the effect of a collision with a ship at anchor. For this the *Eurymedon* was clearly to blame. This negligence of the *Eurymedon* was from that time a continuing negligence, just as the failure of the *Corstar* to rectify her position in the river was a continuing negligence; and both continued to the collision. It follows that each ship was guilty of negligence towards the other, that each ship thereby contributed to the collision, and that each ship must consequently be held to share the legal responsibility for the result.

I now deal with the legal arguments addressed to us. Greer L.J. has stated the gist of the law applicable for the solution of cases like the present in the form of five rules. His propositions do not, as I understand them, purport to be a codification of the branch of law embodied in *Davies* v. *Mann* (1) and the innumerable cases which have either followed or distinguished it, but only to state shortly those aspects of that branch of law which are germane to the present controversy. With the first four I agree, but the fifth rule can in my view only be regarded as a statement of the legal result of the facts of the present case; as a general rule it would, I think, need some elaboration and qualification.

During the hearing of the appeal Mr. Carpmael for the *Corstar* cited to us most of the cases in which the principle of *Davies* v. *Mann* (1) has been discussed, but in my view the broad feature which results from the cases is, alike in Admiralty and at common law, that the final question is one of fact, to be decided by the tribunal of fact, with due regard

(1) 10 M. & W. 546.

to all the circumstances of the case, as Bucknill J. pointed out at the end of his judgment. I confess to a feeling that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense. I respectfully agree with a phrase of Lord Wright in *McLean* v. *Bell* (1): "the decision of the case must turn not simply on causation "but on responsibility." When a solution of problems of this type is sought solely in terms of causation, it is difficult to avoid the temptation of concluding that the last act or omission in point of time is of necessity not only the last link in the chain of causation, but the determining factor in the result, since ex hypothesi but for that last link the result would never have happened. But legal responsibility does not necessarily depend only on the last link. This is especially so in maritime collisions, just because in the behaviour of large vessels the effect of a given cause may for physical reasons continue in operation for a long time, or may not show itself at all till after a considerable interval of time. And if the cause was set in operation by negligence, it will not lose that characteristic merely through the lapse of time. Until some other person comes " into range " as it were—I include the personified ship of Admiralty parlance—the duty of proper navigation is doubtless abstract, for a breach of it affects no one ; but, as was said by Anglin J. in the judgment quoted with approval by Lord Sumner in *British Columbia Electric Ry. Co., Ld.* v. *Loach* (2), on the emergency happening the abstract obligation becomes a concrete duty towards the person affected by it. In that case the action was by the administrator of the estate of a man who had been killed by a train at a level crossing. The deceased was found by the jury to have contributed to the accident by his own negligence—namely, in crossing without looking out. But they also found that the reason the brakesman failed to stop the train was that by anterior negligence of the company's servants the brake was in a defective condition. In his judgment Anglin J. said : "But there is a

(1) 147 L. T. 262, 264.

(2) [1916] 1 A. C. 719, 726.

"class of cases where a situation of imminent peril has been "created, either by the joint negligence of both plaintiff and "defendant, or, it may be, by that of the plaintiff alone, in "which, after the danger is or should be apparent, there is a "period of time, of some perceptible duration, during which "both or either may endeavour to avert the impending "catastrophe. . . . . If, notwithstanding the difficulties of "the situation, efforts to avoid injury duly made would have "been successful, but for some self-created incapacity which "rendered such efforts inefficacious, the negligence that "produced such a state of disability is not merely part of the "inducing cause—a remote cause or a cause merely sine qua "non—it is, in very truth, the efficient, the proximate, the "decisive cause of the incapacity, and therefore of the mis-"chief. . . . . Negligence of a defendant incapacitating him "from taking due care to avoid the consequences of the "plaintiff's negligence, may, in some cases, though anterior in "point of time to the plaintiff's negligence, constitute 'ultimate' "negligence, rendering the defendant liable notwithstanding a "finding of contributory negligence of the plaintiff. . . . ."

The Privy Council approved that passage, saying that "on the facts of the present case the above observations "applied and were correct"; and the House of Lords have subsequently recognized that Privy Council decision as consonant with English law. In *Loach's* case (1) the Privy Council held that it was the company's negligence which was the effective cause of the accident. A comparable and not infrequent illustration of the continuing character of maritime negligence is defective steering-gear, for which many ships have been held to blame in the Admiralty Court. In such cases the negligence often happens before the voyage begins.

The idea that the last act of negligence is necessarily or even presumably to be regarded as "the efficient, proximate "or decisive" cause of the collision, imputing a legal conclusion of sole responsibility, was rejected by Lord Birkenhead in his opinion in *The Volute*. (2) He there pointed out that there are many cases where the two negligences—of plaintiff

(1) [1916] 1 A. C. 719.

(2) [1922] 1 A. C. 129, 141–144.

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and defendant—are not synchronous, but successive; and yet that in these cases it may be right for the Court to hold both parties to blame, because on the broad common-sense view both contributed to the result. That locus classicus is so much quoted that I venture a parenthetical note in order to call attention to what is, I think, a printing error on p. 143, as it slightly affects the run of the sentence. The penultimate paragraph should apparently have been printed as part of the preceding sentence, following on a semicolon, and not as a separate paragraph after a full stop. The noble Earl was referring to cases where a decision of one alone to blame would be justifiable; he, however, observes that "It would be "difficult to find an instance of such a decision; but many "decisions will be found of both to blame." And on p. 144 he says in effect that where "a clear line" cannot be drawn there are cases "in which the two acts come so closely together, "and the second act of negligence is so much mixed up with "the state of things brought about by the first act, that the "party secondly negligent, while not held free from blame "under the *Bywell Castle* (1) rule, might on the other hand, "invoke the prior negligence as being part of the cause of the "collision so as to make it a case of contribution. And "the Maritime Conventions Act with its provisions "for nice qualifications as to the quantum of blame and the "proportions in which contribution is to be made may be "taken as to some extent declaratory of the Admiralty rule "in this respect."

I venture to add two final observations. The first is that the regime of the proportional rule has freed the Admiralty Court from an undue temptation to shut its eyes to minor degrees of negligence, involving, as was often the case under the half and half rule, an unjust degree of punishment. The second is that the spirit of the proportional rule, in my opinion, calls for the sort of wide view of joint responsibility which Lord Birkenhead thought right. Indeed his Lordship's remark about the proportional rule which I have quoted seems rather to support what I have just said. Such a view of the

(1) (1879) 4 P. D. 219.

proportional rule has a further advantage. I believe it would be consonant with the juridical attitude and practice of other nations who are parties to the Collision Convention to which legislative effect was given in England by our Act of 1911. The object of that Convention was to effect a step towards the international unification of maritime law, and the proportional rule was a most important feature of it. The maintenance of uniformity in the interpretation of a rule of law after its international adoption is just as important as the initial removal of divergence, but never easy to achieve. From my experience of the views of Continental jurists about the proportional rule I feel sure that the broad view of the proportional rule is their view; and if we maintain it here we shall help to preserve that international uniformity which was the object of the Convention on collisions at sea. I do not, of course, suggest that we should judicially mould English law by reference to foreign practice; but that we should in a branch of law covered by international convention preserve uniformity is an obvious advantage, if it is judicially possible.

In the present case there was on the part of each ship a breach of good seamanship, which, as soon as the *Eurymedon* came within range of the *Corstar*, became a breach of definite duty by the one to the other. On the part of the *Corstar* the breach was a combination on the one hand of initial carelessness in anchoring in such a position and with such a length of cable, that with the prevailing wind the ship would obstruct that part of the fairway which it was imperatively necessary should be kept unobstructed, because it was the usual route for traffic both up and down, and on the other of a continuing subsequent failure to correct her position. I do not suggest that she could have corrected it *after* the *Eurymedon* began to get "into range," as I call it; but there was a breach of good seamanship in failing to do it earlier, the effect of which could not be remedied when risk of collision had actually arisen. Once the *Eurymedon* was "in range" a duty to her arose, and the *Corstar* cannot escape blame in the Admiralty sense for the resultant collision. The negligence of the

Eurymedon, on the other hand, as a continuing cause down to the collision, is self-evident.

I think this appeal should be dismissed with costs.

Appeal and Cross-appeal dismissed.

Solicitors for the appellants: *Ince, Roscoe, Wilson & Glover.*

Solicitors for the respondents and cross-appellants: *Bentleys, Stokes & Lowless, for Alsop, Stevens & Collins Robinson, Liverpool.*

E. C. M. T.

POULDEN *v.* POULDEN.

1938

Jan. 18, 19, 20, 21, 27.

Divorce—Connivance—Husband's petition—Conduct of petitioner's agent—Duty of the Court—Onus on petitioner to satisfy Court—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 29, 30, 31—*Supreme Court of Judicature (Consolidation) Act, s.* 178, *sub-s.* 2, *as amended by the Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 4, *sub-s.* 2.

The result of the altered wording of the new s. 178, which is substituted by s. 4 of the Matrimonial Causes Act, 1937, for s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, is that the burden of proving connivance, which was formerly cast on the person alleging it, has been shifted, and, where there are facts suggestive of connivance, the burden of disproof falls on the petitioner.

Where the Court was not satisfied that an inquiry agent employed by the petitioner had not been accessory to or connived at the adultery of the respondent, the petition was dismissed.

HUSBAND'S petition for dissolution of marriage.

The marriage took place in 1921. The petitioner sought the dissolution of the marriage on the ground that the respondent wife had committed adultery at an hotel in London in April, 1936, with a man unknown. By her answer the respondent denied the charge, and alleged that if she had been guilty of adultery as alleged, which she denied, the petitioner had connived at and conduced to her adultery by the conduct of a woman inquiry agent whom he employed for the purpose of obtaining evidence of adultery. By his reply the petitioner denied the allegations of connivance and conduct conducing.

It was found as a fact that the marriage was broken up through the wife's jealousy of a woman friend of her husband's. After they had parted the petitioner employed through his then solicitors a detective agency to watch the respondent, and the petitioner sanctioned the employment of an experienced woman inquiry agent for that purpose. The woman agent proceeded to Westcliff, where the respondent was living, and won her affection and confidence. Later, at a conference at the office of the petitioner's solicitors (not his present solicitors), the woman agent was instructed in the petitioner's presence not to encourage the respondent to do anything she ought not to do. In April, 1936, the woman agent accompanied the respondent to London, and on April 23 an incident occurred at an hotel where the two women stayed, on which a charge of adultery was found to be proved, as stated in the judgment.

Sect. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, enacted: "(1.) On a petition for divorce it shall "be the duty of the court to satisfy itself so far as it reasonably "can both as to the facts alleged and also as to whether the "petitioner has been accessory to or has connived at or "condoned the adultery or not, and also to enquire into any "countercharge which is made against the petitioner. (2.) If "on the evidence the court is not satisfied that the alleged "adultery has been committed or find that the petitioner has "during the marriage been accessory to or has connived at "or condoned the adultery complained of, or that the petition "is presented or prosecuted in collusion with either of the "respondents, the court shall dismiss the petition. (3.) If "the court is satisfied on the evidence that the case for the "petition has been proved and does not find that the petitioner "has in any manner been accessory to or connived at or "condoned the adultery or that the petition is presented or "prosecuted in collusion with either of the respondents, the "court shall pronounce a decree of divorce . . . ."

These sub-sections reproduced without any practical alteration in wording the equivalent ss. 29, 30 and 31 of the Matrimonial Causes Act, 1857.

Sect. 4 of the Matrimonial Causes Act, 1937, substituting a new s. 178 of the principal Act of 1925, enacts: "(1) On "a petition for divorce it shall be the duty of the court to "enquire, so far as it reasonably can, into the facts alleged "and whether there has been any connivance or condonation "on the part of the petitioner and whether any collusion "exists between the parties and also to enquire into any "countercharge which is made against the petitioner.

"(2.) If the Court is satisfied on the evidence that—(i.) the "case for the petition has been proved; and (ii.) where the "ground of the petition is adultery, the petitioner has not in "any manner been accessory to, or connived at, or condoned "the adultery, or where the ground of the petition is cruelty "the petitioner has not in any manner condoned the cruelty; "and (iii.) the petition is not presented or prosecuted in "collusion with the respondent or either of the respondents; "the court shall pronounce a decree of divorce, but if the "court is not satisfied with respect to any of the aforesaid "matters, it shall dismiss the petition."

The Hon. Edward Duke for the petitioner.
R. H. Bayford for the respondent.

Cur. adv. vult.

1938. Jan. 27. BUCKNILL J. reviewed the history of the married life, and, with reference to the instructions given to the woman inquiry agent not to encourage the respondent to do anything which she ought not to do, said: Such instructions were indeed advisable to any one who wished to protect the respondent. To a woman of her character any leading into temptation, any removal of the safeguards against sexual excess, such as the influence of the children and neighbours and the home, would tend to lead to her downfall and to the success of the petitioner in a suit for the dissolution of his marriage.

His Lordship reviewed the evidence as to the movements of the respondent and the woman inquiry agent during their stay in London in April, 1936, and their being in company with men whom they had met at two hotels, with other employees of the detective agency keeping observation on them. With reference to the events of the night of April 23 his Lordship said: The admitted facts are that the woman inquiry agent and the respondent were in their bedroom with two men, non-residents, neither of whom they knew, after 11 P.M., and the woman agent then left the room with one man, leaving the respondent alone with the other. The woman agent on her own story left the respondent with a man who had stated his intention of spending the night with her, without making any protest or any attempt to get the respondent away or the man out of the room.

As to April 23, the facts clearly proved, in my view, are that the respondent, a married woman of thirty-five, being in this hotel under an assumed name, is alone for fifteen minutes in the bedroom with a strange man about midnight, and remains there until there is a knock at the door after she has been informed that there are detectives outside. At the time, on her own evidence, she was reckless and had been drinking a good deal, although she is not accustomed to drink, and she is a woman whom her husband describes as sexually unreliable. I therefore find that sexual intercourse took place between Mrs. Poulden and a man on the night of April 23–24 of such a nature as to constitute adultery.

Bucknill J. proceeded: I next deal with the question of connivance. I am not satisfied that the woman inquiry agent was not accessory to and did not connive at the adultery of the respondent. I do not accept her evidence with regard to the origin of the visit to London. I regard her conduct on the night of April 23 in being a party to taking two men to the bedroom and leaving the respondent alone with one man as conduct deliberately intended to promote adultery by the respondent. I regard with considerable suspicion the failure to produce accounts with reference to her expenditure in London. It tends to corroborate that the woman agent paid for the bedrooms.

How far, then, does the conduct of the woman agent affect the petitioner? In 1872 Lord Penzance decided the case of *Gower* v. *Gower*. (1) The facts of that case are, put another way, identical with this. It was a case where the husband had separated from his wife and had then employed a man to watch her, and, to quote the judgment on that as to what happened, Lord Penzance said: "In the total absence of any "evidence on the other side, the Court cannot but give credence "to their story so far as to believe that Williams induced "and brought about their going to bed together. To what "extent they were intoxicated when they went to bed it "might be difficult to ascertain; but that they were brought "to the place by the contrivance of Williams, for the purpose

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(1) L. R. 2 P. & M. 428, 432, 433.

"of being discovered committing adultery, is the conclusion "at which the Court is forced to arrive." Lord Penzance also said: "I desire to state distinctly and broadly, in order "that, if I am wrong, I may be corrected by a Court of Appeal, "that in my opinion, if a husband employs a man to get "evidence of adultery upon which to obtain a divorce, and "the man so employed sets about to procure the defilement "of the wife, and by the intervention of that man the wife "is purposely induced to commit adultery, the petitioner has "no right to a remedy in this Court for such adultery; and "I further think that the husband would have no right to a "remedy even if it were proved that he had not given any "distinct orders for the purpose." And again: "I decide the "case on the broader ground that the petitioner cannot obtain "the benefit of redress in this court for an act of adultery "brought about by his own agent."

When that case was decided the law on connivance was contained in s. 31 of the Matrimonial Causes Act, 1857, and the result of that Act was to throw on the person alleging connivance the burden of proof. The law at that time, I think, is correctly stated in Rayden on Divorce, 3rd ed., p. 115: "The presumption of law is against the existence of connivance, "and, to establish it, the intention must be clearly shown." The wording, however, of the new Matrimonial Causes Act, 1937, which came into force on January 1, 1938, is different. Counsel for the petitioner submitted that that statute does not apply to this case, but in my judgment s. 4 clearly does apply.

[His Lordship recited the material words of s. 4, reproduced above, so far as they concerned the question of connivance in the case, and continued:]

The judgment of Lord Penzance in *Gower* v. *Gower* (1) seems to me to decide in effect that the word "petitioner" in the section dealing with connivance includes his agent employed by him to get evidence of adultery, and that, if such an agent in the course of his employment connives at adultery, the petitioner is debarred from obtaining his remedy.

(1) L. R. 2 P. & M. 428.

The rule seems fair and just as between husband and wife. Divorce for adultery is granted because of the intolerable injury to the bond of marriage which that offence constitutes; but, if it has been deliberately promoted by the petitioner or his agent employed by him to get evidence of adultery, the petitioner cannot be heard to complain of the injury, and is debarred from the remedy.

I am not satisfied that the petitioner through his agent has not been accessory to or connived at the adultery. That being so, the statute requires that the petition be dismissed.

The petition was dismissed, and the petitioner ordered to pay the respondent's costs.

Solicitors: *De Meza & Menasse; Druces & Attlee.*

W. L.

THE STRANNA.

C. A.

1937
Dec. 15,
16, 17.
1938
Jan. 31.

Shipping—Bill of lading—Timber cargo—Loss of deck cargo—Ship listing while loading—Negligence—Excepted perils—" Perils of the " sea."

While loading a deck cargo of timber, the property of the appellants, the respondents' ship took a sudden and unexplained list whereby a portion of the cargo fell overboard and was carried away by the tide and lost.

In the Court below the respondents' theory that the listing was caused by a strong flood tide and under-current was rejected, the Court being of opinion that the probabilities were that the ship heeled over owing to negligent stowage or mismanagement of the ballast tanks.

The respondents relied on the exception in the bills of lading " perils of the sea . . . . and all and every other dangers and " accidents of the seas, rivers and navigation wheresoever, " including ports of loading . . . . of whatsoever nature and " kind soever . . . . excepted, even when occasioned by " negligence."

The appellants contended that the loss was due to negligence in so loading and/or stowing the cargo that the ship became unstable and unfit to carry the cargo, that a loss so caused was not a loss by " perils ' of ' the sea," and was not within the excepted risks :—

Held, that the loss was of a character to which a marine adventure was subject and came within the exception " perils of the " sea."

Decision of Langton J. [1937] P. 130 affirmed.

Appeal from a decision of Langton J. in an action for breach of contract.

The plaintiffs (appellants), the owners of cargo lately laden on board the steamship *Stranna*, claimed against the owners of the vessel in respect of the loss of a quantity of timber of which the plaintiffs were the owners under bills of lading dated Alma, N.B., July 23, 1935.

By the bills of lading the defendants (respondents) acknowledged the shipment of the timber in good order and condition and undertook to deliver the same in the like good order and condition at Belfast. The plaintiffs contended that in breach of their contract the defendants failed to deliver 4843 pieces which were lost overboard while loading in Herring Cove, N.B., and that the loss was occasioned by reason of

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the negligence of the master or other officers in so loading the *Stranna* and/or so stowing the timber as to render the ship unstable and bring an excessive strain to bear on the timber used as uprights to support the deck cargo, causing the uprights to give way.

The defendants relied on the exceptions in the bill of lading: ". . . . perils of the sea . . . . and all and every "other dangers and accidents of the seas, rivers and navigation "wheresoever, including ports of loading . . . . of whatsoever "nature and kind soever . . . . always mutually excepted, "even when occasioned by negligence, default or error in "judgment of the . . . . master, mariners or other servants "of the shipowners."

The defendants alleged that it was foggy weather, that there was a strong flood tide and a strong under-current, and that the ship took a heavy list first to port and then to starboard causing the stanchions securing the deck cargo to break, and that it was impossible to recover the timber shot overboard owing to the strong tide and the fog.

Langton J. said that the defendants had essayed an explanation of the heeling of the *Stranna* which he could not accept. Their explanation was not in any sense comparable in probability with the probability of their own negligence either in bad stowage or in some way mismanaging the ballast tanks. Consequently, although under the bills of lading the deck cargo was " at charterer's risk," that exception did not protect the defendants. They were, however, in his opinion protected by the exception " perils of the sea . . . . "even when occasioned by negligence."

The plaintiffs appealed.

Sir Robert Aske K.C. and *J. V. Naisby* for the appellants. The shipowners accepted the onus of explaining how the loss occurred and wholly failed to do so. They had to prove a loss by " perils of the sea," and, negligence having been found against them, that the peril, not the loss, was occasioned by negligence: see *The Christel Vinnen*. (1) The reason for the ship listing in calm weather with no wind or sea was never explained.

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(1) [1924] P. 208.

[GREER L.J. The shipowners merely had to show that the loss was caused by a risk which was excepted, not exactly how it happened.]

The shipowners are not excused in respect of an unexplained accident; the fact of non-delivery is prima facie evidence of negligence, and it is common ground that the words "at "charterer's risk" do not protect against negligence.

[*Willink K.C.* The shipowners do not now raise the point that they are protected by the words "at charterer's risk."]

A loss is due to "perils of the sea" when it is occasioned by the condition of the sea, e.g., a storm, by a danger in the sea, e.g., a rock, or when the sea enters the ship and so damages the cargo, e.g., *Blackburn* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (1) (the sea-cock case) or *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), where the exception was "dangers and accidents of the seas." There is, however, no case which establishes that, when the loss is due to the unfitness or instability of the ship not contributed to by any condition of wind or waves, the shipowners are protected by the words "perils of the sea." If a ship is loading cargo alongside a quay and some of the cargo falls into the water it is not a loss by "perils of the sea" any more than if the cargo falls over the other side on to the quay. The nearest case to the present one is *Grant, Smith & Co. and McDonnell, Ld.* v. *Seattle Construction and Dry Dock Co.* (3), where a floating dry dock sank owing to its own inherent weakness; it could not have sunk except in water and yet the loss was held not to be due to a peril of the sea: see also *E. D. Sassoon & Co.* v. *Western Assurance Co.* (4) Both these cases strongly support the appellants' contention. Their cargo was lost owing to some peculiar unfitness of the ship; for some reason she was inherently unstable.

[*Willink K.C.* Unseaworthiness is not pleaded, and it was not raised in the Court below.]

(1) [1902] 1 K. B. 290.
(2) (1887) 12 App. Cas. 518.
(3) [1920] A. C. 162.
(4) [1912] A. C. 561.

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The appellants do not contend that there was a breach of the warranty of seaworthiness at the commencement of the loading, but they do contend that the loss was due to inherent instability and unfitness to carry the cargo and not to perils of the sea. In *Merchants' Trading Co.* v. *Universal Marine Co.* (unreported), referred to in *Dudgeon* v. *Pembroke* (1), where a vessel sank in calm weather apparently from some internal weakness, the loss was found to be not due to a peril of the sea. Langton J. based his judgment on *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2), on the meaning of " perils of the sea," but the House of Lords was not concerned with that question. Lord Herschell was discussing the species of the peril which caused the damage and to which of several enumerated perils it was similar, the only one suggested being " perils of the sea." The decision, however, supports the appellants' argument, for, although the damage was caused by the air chamber of a donkey pump giving way under an excessive pressure of water owing to the outlet being closed, it was held that the accident was devoid of any special marine character and was not due to a "peril of the sea." Langton J. assumed that the accident was fortuitous, but there was no evidence of it ; it may have been unexpected but it was not fortuitous.

[Scott L.J. referred to *Davidson* v. *Burnand.* (3)]

The term " peril of the sea " does not include every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril " of " the sea : per Lord Herschell in *The Xantho.* (4)

[Reference was also made to *P. Samuel & Co.* v. *Dumas* (5) ; *Pickup* v. *Thames and Mersey Marine Insurance Co.* (6) ; *Mountain* v. *Whittle* (7) ; *The Torbryan* (8) ; *Laurie* v. *Douglas.* (9)]

H. U. Willink K.C. and *Cyril Miller* for the respondents. Both *E. D. Sassoon & Co.* v. *Western Assurance Co.* (10) and

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(1) (1874) L. R. 9 Q. B. 581, 596.
(2) (1887) 12 App. Cas. 484.
(3) (1868) L. R. 4 C. P. 117.
(4) (1887) 12 App. Cas. 503, 508.
(5) [1924] A. C. 431.
(6) (1878) 3 Q. B. D. 594.
(7) [1921] 1 A. C. 615.
(8) [1903] P. 194.
(9) (1846) 15 M. & W. 746.
(10) [1912] A. C. 561.

Grant, Smith & Co.'s case (1), which followed it, were insurance cases which stand on a different footing. As Lord Sumner said in *P. Samuel & Co.* v. *Dumas* (2) "analogy between "bill of lading cases and insurance cases is falacious." The words "perils of the sea" have the same meaning in both, but on the question of the cause of the loss different rules and reasoning apply. Both the decisions depended on causation, the loss in each case was caused by the condition of the structure and not to sea peril. In neither case was the loss fortuitous, it was bound to happen. In *Grant, Smith & Co.'s* case (1) the Privy Council had not to consider the meaning of "perils of the sea" and merely said that the loss was not due to a marine risk and that had a marine policy been in existence the underwriters could have relied on the defence of "inherent vice" (see Marine Insurance Act, 1906, s. 55, sub-s. 2 (*c*)). There was nothing inherently wrong with the *Stranna*; she was quite capable of carrying the deck cargo; she had done so with complete safety on previous voyages. The loss of the timber was certainly an "accident" and it was fortuitous; it was a casualty caused by negligence in connection with a ship on the sea, and was the kind of accident that could only happen on the sea. The whole principle is laid down in the trilogy of cases decided by the House of Lords and reported in 12 App. Cas.—namely, *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (3); *The Xantho* (4); and *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (5), and they entirely support the shipowners' contention that this loss was of a character to which a marine adventure is subject and within the exception "perils of the sea." Further, there are the words "dangers and accidents . . . . "of navigation" which "cannot have a narrower inter-"pretation" (per Lord Herschell in *The Xantho* (4)) and, it is submitted, have a wider interpretation.

[They were stopped.]

Aske K.C. replied.

Cur. adv. vult.

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(1) [1920] A. C. 162.
(2) [1924] A. C. 431.
(3) 12 App. Cas. 484.
(4) 12 App. Cas. 503.
(5) 12 App. Cas. 518.

1938. Jan. 31. The following judgments were read :—

Greer L.J. The question involved in this appeal is whether the loss of certain wood cargo delivered on board the steamship *Stranna* was within the exceptions contained in the bill of lading which was the binding contract between the receivers and the ship. The words of the exception in the bill of lading are as follows : " . . . . perils of the sea . . . . and all and "every other dangers and accidents of the seas, rivers and "navigation wheresoever, including ports of loading . . . . of "whatsoever nature and kind soever . . . . always mutually "excepted, even when occasioned by negligence, default or "error in judgment of the . . . . master, mariners or other "servants of the shipowners."

The facts of the case were not really in dispute. They are stated as follows by Langton J. in his judgment : " The "uncontroverted facts are as follows : On July 23, 1935, the "steamship *Stranna* was lying in an open roadstead called "Herring Cove, New Brunswick. She had been lying at "anchor at this spot since July 12, taking on board a cargo "of timber composed of 774 standards or 117,198 pieces, of "which 39,585 pieces were to be carried on deck. At about "noon on July 23 about 12 standards remained to be loaded. "The weather was a thick fog, there was no appreciable wind "and the water was calm.

"Herring Cove is situated just north of Matthews Head in "Chignecto Bay off the coast of New Brunswick, and the "cargo of the *Stranna* was being brought out to her in vessels "known as motor scows which came out of the River Alma "into the Cove. In the early afternoon the vessel, whilst "still loading, listed to port and carried away the wooden "uprights or stanchions on the port side, thereby causing a "considerable quantity of timber to be lost overboard. "The vessel then rolled to starboard, and uprights on that "side were likewise broken, causing or allowing more of the "cargo to fall overboard. A flood tide was running at the "time. The timber drifted away and was soon lost sight of "in the prevailing fog and was not recovered. In all, the lost "timber amounted to about 4843 pieces." The defendant shipowners properly admitted that a prima facie case was made out against them by reason of their non-delivery of the cargo which had been put on board, and they accepted the onus of discharging the prima facie case.

The contentions on behalf of the appellants put forward by Sir Robert Aske were, first, that though a loss happening through the sea coming through a hole in the ship and damaging the cargo is a peril of the sea if the hole be not one which was intentionally made with a view to scuttling the ship, still the fall of the cargo into the water through a hole not intentionally made would not be a peril of the sea, and in the second place he contended that the facts were not within the exceptions, because the vessel was not seaworthy at the time of the loss owing to the way in which she had been loaded. It is to be observed that " perils of the sea " in the contract which we have to consider included perils of the sea " wheresoever, including ports of loading, of whatsoever "nature and kind soever."

In my judgment the first contention is one that cannot possibly be accepted. It seems to me that it follows as a matter of course that if through the leaving of a port-hole open in the 'tween decks water gets in and damages a cargo of rice, and this is a peril of the sea, it is equally a peril of the sea if a valuable part of the cargo should fall into the sea through a port-hole which had been left open during the voyage. With regard to the second contention, it seems to me that a temporary instability of the ship during the loading is not a breach of the undertaking that the vessel shall be fit. No doubt, if by reason of some defect in the hull at the commencement of the loading the vessel was unfit to carry the cargo which was put on board, this would be a breach of the warranty of seaworthiness; but it is not every defect that may arise, and which can easily be corrected before the vessel sails, that can be regarded as a breach of the warranty of seaworthiness. For this purpose I refer to *Steel* v. *State Line Steamship Co.* (1), where the Lord Chancellor, Lord Cairns, points out that the shipowner's engagement is that " the ship

(1) (1877) 3 App. Cas. 72, 76, 78, 80, 82.

"on which the wheat is placed is at the time of its departure "reasonably fit for accomplishing the service which the ship-"owner engages to perform," and owing to the ambiguity of the findings of the Scottish Court the matter was remitted to them to ascertain the true facts. In the course of his judgment the Lord Chancellor also said: "It appears to me "obvious that what is here referred to as peril of the seas is, "as described, something which happens on the transit, "whether land or sea transit, and that of course does not "commence until the ship leaves the port." He further says: "It may be, that if the port-hole (still looking at this verdict "alone) was unfastened at the time of the sailing of the ship, "the port-hole may have been so situated and the access to "the port-hole such as that at any moment, in prospect of "any change of weather, the port-hole could have been "immediately fastened; and that the ship at the time of her "departure was perfectly free from any charge of not being "adequate for the performance of the voyage which she had "undertaken." Lord Cairns also says: "It may, on the one "hand, be that the port, if open when she left New York, "was not occasioning any danger whatever to the ship so long "as calm or moderate weather prevailed, and it may be that "the port was so circumstanced that, upon any approaching "change of weather, it might immediately have been closed "and fastened down."

It seems to me that the effect of the decision in *Steel* v. *State Line Steamship Co.* (1) is that a defect, which after the voyage starts can readily and easily be cured, does not amount to unseaworthiness at the material time.

It seems to me upon the facts as proved in this case that this vessel was not unseaworthy at the time of the loss, because the overloading on the port side might quite easily have been rendered innocuous by balancing it by a sufficient load on the starboard side.

For these reasons I think both branches of the argument of Sir Robert Aske on behalf of the appellants fail.

Great reliance was placed by Sir Robert Aske on *Grant,*

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(1) 3 App. Cas. 72.

Smith & Co. and McDonnell, Ld. v. *Seattle Construction and Dry Dock Co.* (1), but that case seems to me to have no bearing on the present case, because there it was established that by the nature of its construction the dry dock was unfitted to bear the loads which it had to bear. I do not think that case supports the appellants' arguments.

To sum up, I think there was an implied warranty of seaworthiness at the time the ship started to load her cargo, but that there was no breach of this warranty, as the ship was in all respects fit to load the cargo. After the warranty of seaworthiness came into operation when the vessel began to load, there occurred a peril of the sea from which the defendants were by the express terms of the bill of lading excused. The exception applied to the period of loading at the port of loading. We are not here concerned with any question of seaworthiness, or of the exceptions in the bill of lading, after the vessel was fully loaded and sailed. There was no want of seaworthiness then, and no loss incurred thereafter. It is worth while noting that the loss of the timber was due not to its falling into the sea but to its being carried away by the tide or by currents in the bay during a fog, so that it became a total loss. For these reasons I am of opinion that this appeal should be dismissed with costs.

SLESSER L.J. I agree that this appeal fails. For the reasons stated by my Lord the sole question which falls to be considered upon this appeal is whether the loss was or was not caused by perils of the sea. In my opinion, on the facts as found by the learned judge, he was entitled to come to the conclusion that this cargo was so lost.

The list of the ship which caused the cargo to fall overboard was certainly a fortuitous accident, not a necessary or even a probable incident of the adventure. The perils of the sea are expressed in the contract to include ports of loading, and, therefore, it was not necessary that the ship should be on her voyage to fall within the exception in the bill of lading.

In *Stott (Baltic) Steamers, Ld.* v. *Marten* (2) the facts were that a ship was being loaded in dock and a boiler was swung over her side by a crane erected on another ship when the boiler caught in the hatch coamings and fell into the hold, injuring the ship. Lord Atkinson says: "The loading of a "ship with her cargo is no doubt in one sense a preparation "for her sailing . . . . unless the accident which occurs in the "course of those preparatory operations be occasioned by a "cause similar to perils of the sea it is not covered by such "a policy as this." He held that the breaking of the crane was not a cause similar to the perils of the sea any more than was the bursting of the air chamber of the donkey engine pump in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1), for the damage must be of a character to which a marine adventure is subject: see Lord Ellenborough in *Cullen* v. *Butler.* (2)

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(1) [1920] A. C. 162.

(2) [1916] 1 A. C. 304, 312.

Here, on the other hand, I think that the loading of the ship was directly connected with her sailing, in that her loading and stowing was a necessary incident of the marine adventure. I distinguish this case from *Stott's* case (3) because, in the language of Lord Haldane in that case, "the "accident which occurred was one which might happen in "loading a railway truck just as much as in loading a ship, "so far as its general character was concerned," whereas here the damage was of a character to which the marine adventure was subject. It was fortuitous in that no one could predict that the vessel would list while being loaded. It was, in the proper sense of the word, accidental and not designed. Moreover, as I have pointed out, it is to be observed that in the present bill of lading dangers of the sea are expressly stated to include ports of loading.

The only authority which at all can be said to support the appellants' case is that of *Grant, Smith & Co. and McDonnell, Ld.* v. *Seattle Construction and Dry Dock Co.* (4) in the Privy Council. But the analogy which their Lordships drew between that case and that of *E. D. Sassoon & Co.* v. *Western Assurance*

(1) 12 App. Cas. 484, 498.
(2) (1816) 5 M. & S. 461, 465.
(3) [1916] 1 A. C. 304, 309.
(4) [1920] A. C. 162, 171, 172.

Co. (1) shows that in their view if a vessel is unfit to carry the cargo which she was loading through her own inherent weakness, and without accident or peril of any kind she were to sink in still water, it would not be a peril of the sea. "An insurance against perils of the sea" points out Lord Buckmaster "is not a guarantee that a ship will float . . . . "and had such a policy been effected it would not have "covered a loss inevitable in the circumstances due to the "unfitness of the structure, and entirely dissociated from any "peril by wind or water."

In this case, in my opinion, on the facts, as I have stated, the peril was caused evitably by a peril produced during loading in port. I would apply to this case the definition of perils of the sea accepted by Lord Bramwell in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2)—namely: "Every accidental circumstance not the result of ordinary "wear and tear, delay, or of the act of the assured, happening "in the course of the navigation of the ship, and incidental to "the navigation. . . . ."

SCOTT L.J. I agree. The appeal depends upon the proper interpretation of the exceptions clause in the bill of lading. The material facts can be stated shortly. The steamship *Stranna* was on February 14, 1935, chartered by the plaintiffs from her owners to load a cargo of sawn timber including deck load at Herring Cove in New Brunswick. Thirteen bills of lading were there issued by the captain to the plaintiffs in accordance with the charterparty making the cargo deliverable at Belfast to their order. The action was brought for short delivery of a considerable portion of the deck cargo which had been lost overboard at the loading port in the circumstances hereinafter appearing. The question of liability only was tried in the Court below, it being agreed that the investigation into the question of quantity should be referred. The bills of lading stated that the deck cargo was "at "charterer's risk," but there was no reference to negligence of the shipowners' servants in that context. There was,

(1) [1912] A. C. 561.

(2) 12 App. Cas. 484, 492.

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however, later in the document a general exceptions clause which excepted (inter alia) "perils of the sea, fire, barratry, enemies, thieves, restraint of princes, collisions, stranding and all and every other dangers and accidents of the seas, rivers and navigation wheresoever, including ports of loading . . . . of whatsoever nature and kind soever . . . . even when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners." The substantial question in the case was whether the defendants brought themselves within this clause.

For loading, the vessel lay out in the bay at a distance of a mile and a half from the shore, and the cargo was brought to her from the mill up-river in motor-scows. She was built in Glasgow in 1925—250 feet long, 39 feet beam, 1547 tons gross, with four holds and four hatches, and water ballast tanks. She had been engaged, as had her sister ship, for some years in the carriage of timber cargoes. As the learned judge says in his judgment, no attack was made upon her seaworthiness. Neither in the statement of claim nor in the reply in answer to the defendants' plea in the defence of the exceptions clause in the bills of lading, was there any allegation of unseaworthiness or unfitness of the vessel to receive and carry the cargo in question.

The loading began on July 13 and the under-deck cargo was completed on the 19th. The loading of the deck cargo proceeded from then until the 23rd. At 11.40 A.M. of that day, there being only a comparatively small quantity still to load, the captain went ashore to sign the bills of lading. The height of the deck cargo then was about 14 feet on the fore-deck and 13 feet on the after-deck, the ship's draught being 17 feet 7 inches forward and 18 feet aft: the ship was then upright. According to a statement by the chief officer (who remained on board), admitted as evidence by consent of the plaintiffs, this is what happened. During the captain's absence, shortly before 1.0 P.M. the vessel slowly listed to port 20 to 25°; the vertical stanchions of wood erected to contain the deck cargo then under the resulting pressure on the port side broke off short along part of the ship's length and part of the deck

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cargo thus unsupported shot overboard into the water. The centre of gravity of the deck load being by this removal of weight on the port side of the mid-ship line shifted to the starboard side, the ship then swung back and over to the opposite side, listing to starboard so far as to submerge the mid-ship deck, with the result that the increasing weight of the deck cargo caused the wooden stanchions along the whole length of the ship on that side to break off short and a still larger portion of the deck cargo shot into the sea on that side. A strong tide was running at the time, and there was also a thick fog. The consequence was that all the cargo in the water was carried away by the current, and none recovered.

The master put forward a theory that the list to port was caused by the interaction of two tidal currents. It was about the turn of the ebb at the time, and he thought the flood current set up against the starboard side of the ship for a depth of half the ship's draught and that below that level the ebb was still running in the opposite direction, the result of this was, in his view, to cause a mechanical couple of opposite forces and produce an upsetting movement to port on the ship. But there seemed to be no solid foundation for this theory, and the learned judge having heard it, and having had the advantage of two first-class surveyors and marine engineers in the box—Mr. Camps for the defendants and Mr. Flannery for the plaintiffs—disbelieved it. The seaworthiness of the ship, i.e., her fitness to receive and carry such a cargo, not being attacked, the only explanation left was necessarily some mistake in her loading. What the mistake was never really came to light. There was much discussion with the witnesses upon the theory of stability, but it was very confused: at any rate the transcript is in parts unintelligible. The data for any stability calculations were wholly lacking. If it were necessary to come to a definite conclusion on the questions relating to stability before a judgment could be given on the issue between the parties, a new trial would be necessary, as it is quite impossible to form any clear idea of what the position really was in that respect from the transcript of evidence. But I do not think it is at all necessary: and indeed I do not believe that any new trial would now reveal the relevant facts. I doubt, for instance, whether the truth was told either about the ballast tanks, or about the inclination of the ship from the vertical when the lifts of timber were made from the scow alongside during the last morning. One broad fact is, however, plain. At the moment when the ship listed the 20 to 25° to port after having remained practically upright for some time, she must already have had her centre of gravity raised unduly, so as to bring it up to, or actually above her metacentre—or in popular language to make her top-heavy; and this must have been brought about by some mistake in the loading, most probably by mismanagement of her ballast tanks, i.e., by omission to give her enough weight low down. Unfitness of construction of the ship for the carriage of such a deck cargo being ruled out, some wrong distribution of weight in the process of loading is the only possible mechanical explanation of what happened. I desire to make it clear for myself that I do not see any evidence in the case of any other cause of the casualty than a mistake in loading, including in that word the management of the ship during loading.

The legal position which results is simple. If what happened falls within the descriptive words of the earlier part of the exceptions clause, as a peril of the sea or some one or other of the more general causes of loss there expressed, the defendants are protected; for the latter part of the clause prevents their losing the protection even if the happening of the peril was brought about by the negligence of their servants.

I have already quoted the relevant words. The learned judge went through all the more important decisions and has given a carefully considered judgment. I agree with his analysis of the cases and do not therefore think it necessary to examine them in detail over again.

In my view what happened was a loss by a peril of the sea, and none the less so because it was the negligence of those who were concerned with the work of loading the ship that brought the peril into operation. It was argued by Sir Robert Aske that if the listing of the ship was caused by bad loading,

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that very fact excluded the idea of a peril of the sea, his contention being that the meaning of that phrase in the English language, or at any rate as judicially defined, restricts it to cases where the damage to ship or cargo by the sea, or sea water, arises through external causes such as wind and weather, or striking a rock, or where sea water actually gets into the ship. I do not agree. Even apart from the wider expressions in the clause which come after " perils of the sea," it is, in my opinion, an appropriate use of the English language to say that on the facts of the present case the timber was lost by a peril of the sea. The fortuitous aspect of the meaning of the word " peril " in a contract either of carriage or of insurance is plainly satisfied by the evidence. As the learned judge points out, so far as the defendants' servants were concerned, the event was wholly unexpected, it was just an unfortunate accident. But it was also a peril *of* the sea and not merely a peril *on* the sea. It could not have happened on land; it was a happening which is characteristic of the sea, and of the behaviour of ships. Nothing but a ship, water-borne and moving freely under the two forces of gravity and buoyancy, could have listed as the *Stranna* did and caused her wooden supports to break off as hers did, and her cargo to be irretrievably lost in the fog and the tidal current as hers was lost. The liability of a ship floating in the sea, and free to respond to the changing interaction of the forces of gravity and buoyancy as the cargo is loaded, and thereunder to list sideways and so to cause a sudden loss of deck cargo is in my opinion essentially one of the sea risks to which maritime commerce is exposed. It falls within the passage in Lord Herschell's speech in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) which the learned judge cites—it is " damage of a character to which a marine adventure is "subject "; and therefore a loss by such an event is a loss by a peril of the sea.

If this reasoning be sound, the other perils in the clause do not matter; but if, contrary to my opinion, there be any doubt about the facts being covered by the phrase " perils

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(1) 12 App. Cas. 484, 498.

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"of the sea," it is to be observed that the other phrases used in the clauses are wider still: "All and every dangers and "accidents of the seas, rivers, *and* navigation whatsoever, "including ports of loading . . . . of whatever nature and "kind whatsoever." In a commercial document like a bill of lading it would be contrary to the ordinary use of language by commercial men to interpret these wider expressions as insufficient to cover the facts of this case.

There is one other point which calls for notice. It was argued by Sir Robert Aske—perhaps a little faintly—that if by the negligence of the defendants' servants the ship was brought into a condition of unstable equilibrium, the result was a breach of the warranty of seaworthiness. This argument, however, rests on a misapprehension of law. Whilst there is a warranty, when loading begins, that the ship is fit to receive the cargo, and also a warranty on sailing that she is fit to carry the cargo loaded in her, there is no intermediate warranty between the two. Negligence in the loading causing a loss before the loading is complete does not constitute a breach of any warranty.

For the above reasons I agree that the defendants established a good defence under the bill of lading contract and that the appeal must be dismissed with costs.

Solicitors for the appellants: *Waltons & Co.*

Solicitors for the respondents: *William A. Crump & Son.*

E. C. M. T.

GOLDIE *v.* ADAM AND OTHERS (HALLAM CITED).

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Probate—Will revoked by later will—Codicil to revoked will—Mistake in reference—Earlier will not revived—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 22.

A testator made a will dated June 9, 1929, and three codicils thereto. He made a will on September 11, 1932, revoking the earlier will and codicils. On August 12, 1933, he executed a testamentary document expressed to be a fourth codicil to the revoked will of 1929 and ending with the words: "In all other "respects I confirm my said will":—

Held, there was no evidence that the draftsman applied his mind to the provisions of the will of 1929 or to the three codicils thereto, and the mind of the draftsman must be treated as the mind of the testator; there was a complete absence of any words of revival; there were indications of ignorance on the part of the draftsman of the codicil of 1933 concerning the revocation of the will of 1929 and the codicils thereto; and the will of 1932 and the codicil of 1933 must be pronounced for, omitting from the latter the reference to the revoked will.

In the Goods of Steele (1868) L. R. 1 P. & M. 575 followed.

In re Chilcott [1897] P. 223 distinguished.

PROBATE ACTION.

This action arose out of the testamentary dispositions of Mr. Daniel Claude Maynard Taylor, of Castle Road, Salisbury, Wiltshire, who died on January 6, 1935, leaving estate of the value of some 15,000*l.* He made a will dated June 9, 1929, and three codicils thereto, all of which he revoked by a will dated September 11, 1932. He also executed on August 12, 1933, a testamentary document in the following terms: "This is a fourth codicil to the last will and testa- "ment of me (testator's full name) which will bears date "the ninth day of June 1929 whereby I give and bequeath "the legacy or sum of six thousand pounds (duty free) to "my friend (name and address of legatee). In all other "respects I confirm my said will and the first three codicils "thereto."

The plaintiff as executor named in the will of September, 1932, claimed probate of that will, and also of the codicil of August, 1933, subject to the omission of the words from the latter document which referred to the earlier will and codicils. The defendants would have benefited by a contingent reversion to 10,000*l.* under the will of 1929, which bequest was revoked by the will of 1932. They claimed that the codicil of August, 1933, expressly revived the will of 1929 and the three codicils thereto and thereby revoked the will of 1932. In reply, the plaintiff said that the reference in the codicil of August, 1933, to the will of 1929 and the codicils thereto was an error.

The remainder of the facts and the arguments sufficiently appear from the judgment.

The Wills Act, 1837, s. 22, provides: " No will or codicil . . . . "or any part thereof, which shall be in any manner revoked, "shall be revived otherwise than by the re-execution thereof, "or by a codicil executed in manner hereinbefore required, "and showing an intention to revive the same. . . . ."

R. F. Bayford K.C. and *R. H. Bayford* for the plaintiff.
H. W. Barnard for the defendants.

Feb. 3. BUCKNILL J. This is a probate action arising out of the death of the late Daniel Taylor, who died on January 6, 1935. The approximate value of the estate is 15,000*l.* The plaintiff is the surviving executor of a will executed by the testator on September 11, 1932, and of a codicil dated August 12, 1933, and claims that the will shall be pronounced for and also the codicil, omitting from the codicil all words of reference to an earlier will of the deceased dated June 9, 1929, and three codicils thereto, made in 1930 and 1931. The defendant, Mr. Adam, and Mr. Hallam, a party cited, claim that the will of September 11, 1932, was revoked by the codicil dated August 12, 1933, which was the last testamentary document executed by the testator. [His Lordship read the terms of that document, and continued:]

Counsel for the defendant said that he would not argue that this last codicil revoked the will of 1932, but he argued that the words of the codicil plainly showed an intention to revive the will of 1929 and the three earlier codicils and that the Court should admit both wills and all four codicils to probate.

The will of 1932 in terms revoked all testamentary wills and writings and therefore revoked the will of 1929 and the three codicils of 1930 and 1931. There is in my opinion a latent ambiguity in the words of the fourth codicil, which refer to the testator's " last will dated the 9th June, 1929" whereas the testator's " last will " was in fact dated September 11, 1932. Evidence of the real meaning and intention of the testator in making the codicils is therefore admissible. Accordingly witnesses were called and various letters and documents were proved and the following facts were established.

Mr. Taylor, who died at the age of sixty-three, was the governing director of a business in Hull. His wife died in 1928, leaving him with one daughter. After his wife's death Mr. Taylor was in very poor health. He attended personally on rare occasions at the office in Hull and spent a good deal of his time on board his yacht. Mr. Taylor entrusted his business and private affairs to Messrs. Locking & Locking, a firm of solicitors in Hull. At the material time there were two Mr. Lockings, father and son, partners in the firm. Mr. Locking Senior died in 1937, about two years after Mr. Taylor, at the age of eighty-four, and Mr. Locking Junior died a month after his father.

After his wife's death Mr. Taylor made several wills or codicils before the will of 1929. All these documents were prepared for him in the office of Messrs. Locking & Locking, and were preserved in the safe in their office in which clients' wills were kept. On June 9, 1929, Mr. Taylor made the will which it is now sought to revive. This will did not in terms revoke all earlier wills, but Mr. Locking Senior wrote in red ink across the front of an earlier will "Cancelled" and inserted the date, but retained the cancelled will in the safe. After due execution the will of 1929 was also placed in the safe.

Under the will of June 9, 1929, Mr. Taylor (inter alia)

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provided that if his daughter died without issue who attained the age of twenty-one the sum of 10,000*l.* should be divided equally between Mr. John Hallam and Mr. Ernest Adam. On December 1, 1930, Mr. Taylor executed a codicil to this will, and on September 17, 1931, he executed the second codicil, and three days later he made a third codicil. The second and third codicils were typed at the end or in the fold of the sheet of paper on which the first codicil was typed.

At the time that Mr. Taylor executed this third codicil he wrote to his old friend Mr. Locking Senior a letter in which he said that he wished to make a fresh will and dispose of the sum of 10,000*l.* in another way so far as Messrs. Adam and Hallam were concerned, but nothing further was done about it at that time. About a year later Mr. Taylor again wrote to Mr. Locking Senior suggesting alterations to his will for the purpose of cancelling his bequest to Mr. Hallam and Mr. Adam. A fresh will was accordingly prepared, in all probability by Mr. Locking Senior, who had the sole confidence of Mr. Taylor with regard to his domestic affairs. The main alterations made by this will in the disposition of the testator's property was to delete the names of Messrs. Hallam and Adam from the will.

This will was posted to Mr. Taylor, who brought it to Harrogate and executed it there on September 11, 1932. After Mr. Taylor had executed the will, he handed it in its envelope to a Mr. Verity and asked him to give it to Mr. Locking Senior. Mr. Verity handed the will in the envelope to Mr. Locking Junior and asked him to give it to his father. Mr. Locking Senior and Mr. Locking Junior are now dead, and it is impossible for the Court to receive their account in the witness-box of the subsequent history of the will of 1932. The only evidence placed before me was that this will was found after Mr. Taylor's death, not in the safe for clients' wills but in Mr. Locking Senior's private safe. Moreover the will of 1929 and the three codicils remained intact in the clients' safe although they had been specifically revoked, and have not got the words " Cancelled " in red ink written across them, such as had been written by Mr. Locking Senior in the case of the earlier will of Mr. Taylor.

After Mr. Taylor had made this his last will, he went abroad, and on his return he started some heavy litigation, in which Mr. Locking Junior acted for him, because it was rather more than Mr. Locking Senior could undertake. On August 12, 1933, Mr. Locking Junior with his clerk Frederick Smith went to Mr. Taylor's office in Hull, taking with him the sheet of paper on which the three codicils were typed and probably the sheet of paper on which the 1929 will was typed. He also took with him various papers connected with the litigation. Mr. Locking in the presence of Mr. Taylor dictated to Mr. Smith the draft of the fourth codicil to which I have already referred and told him to transcribe it on the sheet of paper on which were the three earlier codicils. Mr. Smith did this and took it back to Mr. Taylor's room. Mr. Locking then read the codicil out to Mr. Taylor, who duly executed it. Mr. Locking then took the piece of paper back to the office of Messrs. Locking & Locking, and it was replaced in the office safe. Mr. Smith proved that on this particular day Mr. Locking Senior was not in the office and attended there very infrequently at that time.

These are the material facts of the case, and the question which the Court has to decide is whether the will of 1932 and the fourth codicil should be admitted to probate with the deletion from the fourth codicil of all reference to the 1929 will and three codicils, or whether in addition to these two documents, the 1929 will and the three earlier codicils should also be admitted to probate.

The will of 1929 and the three codicils executed before the will of 1932, were revoked by the will of 1932 and therefore they cannot be revived by the fourth codicil unless the case falls within the provisions of s. 22 of the Wills Act, 1837. The object of the Legislature in passing this section was presumably to put an end to implied revivals. Lord Penzance in *In the Goods of Steele* (1) said that in his view the Legislature meant that the intention to revive should appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the Court with reasonable certainty the existence of the intention to revive the revoked will.

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(1) L. R. 1 P. & M. 575.

In this case do the words of the fourth codicil show an intention to revive the will of 1929 and the three codicils? There is nothing on the face of the document or in the surrounding circumstances from which the Court can infer an intention to revive the revoked will and codicils, save this, that the codicil refers to them and purports to confirm them. But the will of 1929 was not in fact the last will of the testator, and had in fact been revoked.

On the other hand the facts seem to me to indicate that the words in the codicil of 1933 referring to the will of 1929 as the last will and referring to the three codicils, were placed there by mistake and that the testator never intended to revive them. The words of the 1933 codicil when interpreted in the light of the surrounding circumstances do not show an intention to revive the revoked will of 1929 or the three codicils which were all revoked by the will of 1932.

This decision is in accordance with the decision of Sir Samuel Evans in *Jane* v. *Jane* (1), in which the cardinal facts were similar to the facts in this case. Sir Samuel Evans in that case based his decision on the judgment of Lord Penzance in the case of *In the Goods of Steele.* (2) The learned President's attention, however, does not appear to have been directed to the decision of Gorell Barnes J. in the case of *In the Goods of Chilcott.* (3) From the headnote of that case it appears that the testatrix made a will in 1889. In 1892 she executed a fresh will, prepared by a different solicitor, revoking the former will. In 1893 she executed a codicil, prepared by her original solicitor, who was in ignorance of the existence of the second will, and had inserted in the codicil a clause confirming the will of 1889. The cardinal facts therefore are in some respects also similar to the facts in this case.

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(1) (1917) 33 Times L. R. 389.
(2) L. R. 1 P. & M. 575.
(3) [1897] P. 223.

Gorell Barnes J. in his judgment said (1): "There "is no doubt that in drawing the codicil of 1893 "the solicitor meant to deal with the will of 1889. . . . . "In the present case there can be no doubt that the solicitor, "who only knew of the existence of the first will, ... applied "his mind to the first will, and then drew the codicil of Septem-"ber 7, 1893. . . . . The result does not express, I am aware, the "real intention of the testatrix, but I can only deal with the "documents as they stand. I think therefore that all three "documents, namely, the wills of 1889 and 1892 and the codicil "of 1893 must be admitted to probate, their meaning being "left to a court of construction, if necessary, to determine."

Gorell Barnes J. based his decision in *Chilcott's* case (2) upon the judgment of Sir James Hannen in the case of *In the Goods of Dyke* and *In the Goods of Stedham.* (3) Sir James Hannen decided those cases on the ground that there was no mere mistake as to the date of the will to which it was intended to append the codicil, but that the mind of the draftsman, which must be treated as that of the testator, was actually applied to the provisions of the earlier will, so that it was impossible to say that it was by mistake that that instrument had been referred to.

Now in the case before me there is no evidence that Mr. Locking Junior applied his mind to the provisions of the will of 1929 or to the three codicils. The question whether the words in the codicil of 1933 referring to the date of the last will and to the three codicils were really brought to the notice of the testator is a question of fact. I doubt very much whether in this case these words were ever really brought to the notice of the testator.

The guide to my decision in this case is s. 22 of the Act of 1837. Do the words of the 1933 codicil show an intention to revive the revoked will of 1929 and the revoked three

(1) [1897] P. 225.
(2) [1897] P. 223.
(3) (1881) 6 P. D. 205.

codicils? I adopt Lord Penzance's words in *In the Goods of Steele* (1) that I ought to be slow to conclude that a will has been revived in this indirect kind of way. In this case, if Mr. Taylor in 1933, when the fourth codicil was prepared, told Mr. Locking Junior that he wished to revive the 1929 will and the three codicils, Mr. Locking as an experienced solicitor surely would have specifically set out his client's intentions on that point in the codicil. There is, however, a complete absence of any words of revival. On the other hand there are the use of the very inappropriate words " the "last will" and " I confirm" in the codicil. There is the absence of any external evidence of a change in the testator's mind towards Messrs. Hallam and Adam, and there are the facts relating to the dealings in the solicitors' office with the 1929 will and the three codicils after their revocation, which indicate ignorance on Mr. Locking Junior's part of their revocation. All these factors unite to convince me that Mr. Taylor did not intend to revive the 1929 will and the three codicils, and that the words of the codicil in the circumstances of this case do not show an intention to revive them.

I therefore decide in favour of the plaintiff's claim and admit to probate the 1932 will as being the last will of the testator and the 1933 codicil, omitting from the codicil the reference to the revoked 1929 will and the revoked codicils.

[His Lordship allowed the defendants their costs out of the estate.]

Solicitors for the plaintiff: *Gerrish & Foster, for Locking & Locking, Hull.*

Solicitors for the defendants: *Marchant, Newington & Dommett.*

(1) L. R. 1 P. & M. 575.

W. L.

CHAPMAN *v.* CHAPMAN AND THOMAS (TAYLOR INTERVENING).

1938
Feb. 18.

Divorce—Husband's petition in 1935—*Wife's answer with charges of adultery and desertion and prayer for divorce—Further answer in* 1938—*Wife's prayer for divorce on ground of desertion—Wife granted leave during trial to present petition forthwith containing same charges—Effect of husband's petition on desertion—Jurisdiction—Retrospective effect of statute—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 180—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2, *sub-s.* (*b*).

Where a husband petitioned for divorce in 1935 and the wife filed a further or supplemental answer in January, 1938, praying for divorce on the ground of desertion for at least three years immediately preceding the filing of the further answer, the wife was granted leave at the hearing to present and serve forthwith a petition containing the same charges as in her further answer :—

Held, (1.) that the charges of adultery on either side were not established ; (2.) that the further answer, being supplemental to the answer, was part of the original answer, on the authority of *Sandler* v. *Sandler* [1934] P. 149, and therefore could not be the subject of relief under the Matrimonial Causes Act, 1937 ; (3.) that the charge of desertion against the husband since June, 1933, was made out ; (4.) that the desertion continued till the presentation of the wife's cross-petition, and the period of desertion continued to run against the husband despite the presentation of his divorce petition, and nothing which the wife did by the presentation or prosecution of her proceedings altered that position ; (5.) that the wife was accordingly entitled to a decree of divorce under the Matrimonial Causes Act, 1937.

Stevenson v. *Stevenson* [1911] P. 191 distinguished.

Semble, a decree of divorce may be pronounced on the ground of desertion, part of which ran before January 1, 1938, the date on which the Matrimonial Causes Act, 1938, came into operation.

HUSBAND'S PETITION for dissolution of marriage.

By his petition dated June 12, 1935, the husband sought the dissolution of his marriage on the ground of his wife's alleged adultery with a man named Thomas. By her answer the wife denied the charges, and alleged that the husband had committed adultery with a Miss Taylor, and had deserted her in June, 1933, and prayed for a divorce. The husband and Miss Taylor, intervening, denied the cross-charges.

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The Matrimonial Causes Act, 1937, received the Royal Assent on July 30, 1937, and came into force on January 1, 1938. Before the end of 1937 the wife was granted leave to file a further or supplemental answer alleging desertion within the meaning of s. 2, sub-s. (*b*), of that Act, and on January 11, 1938, she accordingly filed her further answer alleging that her husband had deserted her in June, 1933, without any just cause, and that he had since then continued to desert her without cause for a period of at least three years immediately preceding the presentation of that further answer. By a further reply the husband denied the charge.

J. Roland Adams for the husband.

The Hon. Ewen Montagu and *Peter Bristow* for the wife.

The co-respondent did not appear.

At the hearing the charges of adultery against the husband and the intervener were withdrawn, and on the conclusion of the evidence the learned Judge found that none of the parties had committed adultery. He reserved judgment on the question whether the wife was entitled to a decree on her petition alleging desertion, under the Matrimonial Causes Act, 1937.

1938. Feb. 18. HODSON J. read the following judgment: The original petition for dissolution of marriage in this case was presented by the husband on June 12, 1935, and contained an allegation of adultery by the wife with the co-respondent. The co-respondent took no part in the proceedings. By her answer filed on June 27, 1935, the wife denied the adultery alleged against her, cross-charged her husband with adultery and desertion, and also prayed for dissolution of the marriage. By a pleading described by its introductory words as a further answer and in the body of it as a supplemental answer dated January 11, 1938, the wife alleged that the husband had deserted her without cause for a period of at least three years immediately preceding the filing of this answer, and prayed as before. The husband replied denying the allegations of his wife.

The suit was contested before me by the wife, the husband

and the woman named in the wife's petition, who intervened in the suit. During the course of the hearing the charge of adultery made against the intervener was rightly withdrawn, the wife and her advisers being satisfied that medical evidence was available to prove that at all material times the intervener was a virgin. At the conclusion of the evidence I found that the charge of adultery made against the wife had failed and took time to consider my judgment on the question of desertion and the wife's right to a dissolution of her marriage under the Matrimonial Causes Act, 1937, which came into operation on January 1 of this year.

The relevant part is s. 2, of which sub-s. (*b*) deals with desertion. So far as is material to the present case, the section reads as follows: " A petition for divorce may be "presented to the High Court (in this part of the Act referred "to as 'the court') either by the husband or the wife on "the ground that the respondent . . . . (*b*) has deserted "the petitioner without cause for a period of at least three "years immediately preceding the presentation of the peti- "tion."

The first question is whether or not I can pronounce a decree on this ground at all since the proceedings were founded on a petition presented before the Act of 1937 came into operation, and I have to consider whether or not the pleading dated January 11, 1938, to which I have referred, could be properly described as a petition presented after January 1, 1938. Sect. 180 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides: " If in any proceedings for "divorce the respondent opposes the relief sought, in the "case of proceedings instituted by the husband, on the "ground of his adultery, cruelty or desertion, or, in the case "of proceedings instituted by the wife, on the ground of "her adultery, cruelty or desertion, the court may give to "the respondent the same relief to which he or she would "have been entitled if he or she had presented a petition "seeking such relief."

If, therefore, the pleading of January 11, 1938, had stood alone, the matter could, I think, have been disposed

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of as if that pleading had been an original petition. It was, however, a further answer to the petition and concluded by a reference to the prayer of the first answer, which was, of course, filed long before January 1, 1938. It is thus, in form at any rate, in the nature of a supplement to the first answer, and a question arises whether or not it could stand by itself having regard to the decision of the Court of Appeal in *Sandler* v. *Sandler* (1), which made it clear that a supplemental petition for divorce is not a separate petition but is part of the original petition.

In my judgment it could not, and I accordingly at the hearing gave the wife leave to file and present a petition containing the same allegations as were contained in the so-called further answer and directed the reply of the husband to stand as an answer to that petition and ordered the suits to be consolidated.

The second question is whether or not the period of desertion was uninterrupted. The facts of the case are simple. On June 11, 1933, the husband left the wife and there is no doubt that the reason for his departure was his suspicion about her relationship with the co-respondent. It was common ground before me that, if those suspicions were unfounded, the husband had in fact deserted his wife, and his desertion continued until the trial unless interrupted by the institution of proceedings. Now the petition for divorce instituted by the husband almost exactly two years after he left his wife effectively prevented his wife returning to him so long as that suit was being maintained. It cannot, in my opinion, be contended that the husband could in that way by his own act prevent desertion running against himself; but the wife, by her original answer, filed within the three year period, by which she prayed for dissolution, may be said to have put it out of her husband's power to return to her and thus to have prevented desertion running against him.

Sir H. Cozens-Hardy M.R., delivering the judgment of the Court of Appeal in *Stevenson* v. *Stevenson* (2), said,

(1) [1934] P. 149.

(2) [1911] P. 191, 194.

referring to a wife who had taken proceedings for divorce against her husband on the ground of adultery and desertion : "At the date of the petition there had not been desertion "for two years, such as is required by the statute. The "desertion had lasted eighteen months only. The presen-"tation of the petition and its continuance on the files of "the Court prevented the subsequent desertion from being "without excuse. She was praying the Court to require "her husband to keep away." In the case before me, however, it was the husband who took the step which effectively prevented the wife returning to him, and in my view nothing which the wife did afterwards by the presentation or prosecution of her proceedings altered the position. The obstacle was put up by the husband and, so long as it stood in her way, no action taken by the wife prevented desertion running against the husband.

The Court of Appeal in the case I have mentioned referred with approval to the very careful judgment of Gorell Barnes J. in *Kay* v. *Kay*. (1) There, referring to an earlier case of *Knapp* v. *Knapp* (2), a decision of Sir James Hannen, Gorell Barnes J. said (3) : "This is the really important "passage, to my mind, which affects the view I entertain "about the matter : 'There never was a time at which "'the petitioner was bound to go back and live with him, "'because she was always justified in refusing to do so as "'long as he continued to live with the woman for whose "'company he had abandoned her ; and, therefore as it "'was in the beginning desertion on his part, and the circum-"'stances have never been changed, that state of things, "'which was a desertion in the first instance, has continued "'such for now more than two years, and consequently "'the petitioner is entitled to succeed.'"

In this case not only was the wife justified in refusing to go back to her husband so long as the divorce proceedings were maintained against her, but it was practically impossible for her to do so, and I find that the desertion

(1) [1904] P. 382.
(2) (1880) 6 P. D. 10.
(3) [1904] P. 393.

of the husband continued from June 11, 1933, until the trial.

I need only add that it is to be observed that the cases to which I have referred deal with proceedings instituted under the Matrimonial Causes Act, 1857, and have to do with a period of desertion without reasonable excuse for two years and upwards, whereas this case falls to be decided under the provision of the Matrimonial Causes Act, 1937, which has to do with desertion for a period of at least three years without cause immediately preceding the filing of the petition. I see no distinction between the words "without reasonable "excuse" and the words "without cause," which latter words were formerly used in conjunction with desertion in judicial separation proceedings under s. 16 of the Act of 1857. The desertion relied on must, however, immediately precede the presentation of the petition in order to be a ground for dissolution under s. 2, sub-s. (*b*), of the Act of 1937, whereas by the old law, as in the case of *Blandford* v. *Blandford* (1), the desertion for two years relied upon as part of the foundation for divorce proceedings might have been completed, condoned by subsequent reconciliation, and yet form, with the subsequent adultery, the basis of a petition for divorce.

There will be a decree nisi on the petition of the wife.

Solicitor for the husband: *J. B. de Fonblanque.*
Solicitors for the wife: *Hunt & Hunt.*

(1) (1883) 8 P. D. 19.

W. L.

BEATTIE *v.* BEATTIE.

1938
March 9.

Divorce—Collusion—Wife's petition—Husband's repeated requests to be divorced—Wife's acceptance of sum towards costs—Supreme Court of Judicature (Consolidation) Act, 1925, *s.* 178, *sub-s.* 2, *as amended by the Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 4, *sub-s.* 2.

A wife, after failing to comply with repeated requests from her husband that she should divorce him on his finding the costs in advance, took steps to ascertain the approximate cost of instituting such a suit, but did not decide to petition until a change in her employment made it appear to her a desirable course. She then accepted from her husband 15*l.* towards the costs, and presented her petition, which was not defended :—

Held, that such a transaction required most careful scrutiny as to collusion. Though there had been full disclosure, if it was a collusive arrangement, no disclosure altered it. On the other hand, if the matter were susceptible of a sinister or an innocent interpretation, a full and candid disclosure might enable the Court to adopt a more charitable view. The acceptance of the money was most unwise and dangerous, but the wife never in fact made any arrangement that in consideration of the money she would bring proceedings, and therefore the petition was not presented in collusion.

WIFE'S undefended petition for dissolution of marriage on the ground of the husband's adultery.

The marriage took place in 1931. When later in that year the wife left her husband she already had ample material for a divorce. Between 1934 and 1936 the husband constantly urged her to bring divorce proceedings, and offered her 500*l.* or to pay the costs. In February, 1937, she obtained an estimate of from 15*l.* to 20*l.* as the cost of initiating proceedings, and reported the fact to him in March. In September, 1937, she accepted 15*l.* from him on the understanding that it was to be used for costs, that she should not tell her solicitors, and that she would return the money if she did not sue for divorce. About the same time he sent her evidence of his adultery in July, 1937, at an hotel with an unknown woman. She then presented her petition. On the disclosure of the wife's acceptance of the 15*l.* the President heard argument on the question of collusion.

H. Durley Grazebrook for the petitioner.

Cur. adv. vult.

1938. March 9. THE PRESIDENT (SIR BOYD MERRIMAN). This is a wife's petition for divorce and I reserved my judgment because suspicions of collusion were raised, which, in my opinion, required careful consideration. I must say in passing that I have considered whether I ought to have referred the matter to the King's Proctor for his assistance, but I am satisfied that I have all the material facts before me and that ultimately the decision rests upon the impression I formed of the wife's evidence, and that the responsibility for the decision must be mine alone.

The parties were married in 1931. If I say that the married life was not a very happy one I am understating it, because, in fact, in 1931 the wife left her husband and they have never lived together again. I am quite satisfied that at the time when she left her husband she already had ample material on which she could take divorce proceedings. Her own evidence was that she was unwilling to do so because, to put it in her own words, she did not wish any other woman to go through what she had gone through. From that time onwards they went their several ways. The next fact of importance is that in the years 1934 to 1936 it is perfectly plain that the husband was constantly attempting to bribe his wife to bring divorce proceedings. He urgently desired his freedom and said he wished to leave this country and go to South Africa, where he had a wealthy relative, and in one form or another he offered 500*l.* or to pay the costs, or, to put it more broadly, "anything to induce" his wife to bring divorce proceedings.

As regards a cash consideration, I am satisfied beyond the slightest possible doubt that the wife never contemplated for a moment accepting a cash bribe from her husband to bring divorce proceedings. But what does require very careful consideration is his offer, constantly repeated, to pay the costs if she would bring proceedings. By the end of 1936 he had asked her to find out what the costs would be, and in February, 1937, having seen two or three separate solicitors, she had obtained an estimate of 15*l.* to 20*l.*, for the purpose, I suppose, of initiating proceedings rather than carrying them right through; at any rate she had obtained an estimate that for the sum of 15*l.* to 20*l.* it would be possible to start proceedings. In March, 1937, the husband reiterated again his request that she should bring divorce proceedings, and she then told him the result of her inquiries with regard to costs. He indicated in the plainest possible way that evidence would be forthcoming if she decided to take proceedings. She said that she would think it over.

In September the husband telephoned again and on this occasion he said, as I find was the fact, that the evidence was in the post, and he wanted again to know what his wife was prepared to do about it. The result was that she agreed to meet him next day, and they met. She accepted 15*l.* from him. She signed some sort of a document, which I have not seen because if it is in existence at all it is in the husband's possession, to the effect that the money should not be used for her own personal benefit, and I think she said it stated that it was to be used for the costs; and, more unfortunate still, he extracted a promise from her that she would not tell her solicitors. I think that a fair interpretation of the document that she signed would be not that it could be regarded as a binding legal instrument, but as between themselves the understanding, I think, was something to the effect that, without there being any definite promise to take divorce proceedings, if she did not, she would be in honour bound to return the 15*l.*

This recital of the facts makes it perfectly obvious that there are here many of the elements of a collusive bargain. It is plain beyond possibility of argument that the husband was doing everything he possibly could to get his wife to bring a collusive divorce suit, and the situation was not made easier by the fact that the evidence of adultery which was sent in a registered envelope in September was of adultery for one night with an unknown woman at a Brighton hotel,

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the husband himself being employed at a South Coast hotel in a neighbouring town. And although this hotel bill related to a date in July before this interview in September, it related to an incident after their last previous discussion in March.

I have so far stated the facts, as they appear after some confusion as to dates, from the worst point of view; and if before January 1, 1938, there would have been the slightest doubt, which, of course, there would not, that a transaction of this sort required the most careful scrutiny, it would be even more plain, if possible, since January 1, 1938, that scrutiny is required; for by s. 4 of the Matrimonial Causes Act, 1937, it is laid down that on a petition for divorce it shall be the duty of the Court to inquire as far as it reasonably can into the facts alleged and—missing out immaterial words—whether any collusion exists between the parties, and then the duty of the Court is stated in the following words: If the Court is satisfied on the evidence that: (3.) the petition is not presented or prosecuted in collusion with the respondent the Court shall pronounce a decree of divorce, but if the Court is not satisfied with respect to this—amongst other matters—it shall dismiss the petition.

The only assistance which I got in the matter in the course of the discussion was a reiteration that there had been full disclosure and that the solicitors concerned had acted with perfect propriety when the matter came to their knowledge. Taken by themselves neither of those matters, though both are perfectly valid points, assists me in this case, because, as Lord Merrivale pointed out in the case of *Carmichael* v. *Carmichael* (1), if what is disclosed is, in fact, a collusive arrangement, no disclosure alters it; and the fact that the solicitors, as they unquestionably did, acted with perfect propriety when the matter was brought to their attention does not affect the matter, because the vice of this transaction, if it was a vicious transaction, was that, without the solicitors' knowledge, but with the knowledge of the wife, the petition was presented in collusion, if this was a collusive arrangement. It is not a case of its having been prosecuted in collusion

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(1) (1925) 42 Times L. R. 133.

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after the solicitors knew the facts. The case, if it is a case of collusion at all, is collusion in the presentation of the petition. But I was not really satisfied in my own mind that the essence of the matter was as sinister as the recital of the facts which I have made appears to show.

In passing I ought to say that I share the view which McCardie J. took of the decision in *Malley* v. *Malley* (1), where Lord Mersey had said in effect that if the arrangement related to something—costs, for example, or maintenance—with regard to which the wife had rights which she could enforce, the arrangement was not collusive. I agree with the late McCardie J.'s comments on that decision in the case of *Laidler* v. *Laidler*. (2) It may be an important factor in deciding whether the arrangement is collusive or not, but it cannot be decisive that the bargain, if there is a bargain, is one which relates to something which the wife could otherwise get by some process of law, and it seems to me to be reasonably clear that the well known case of *Churchward* v. *Churchward* (3), decided by Lord St. Helier, could not have been decided as it was if that had been the decisive test.

There is one thing in this case to which I have not yet referred which seems to me to be of very great importance. I have already said the wife gave in chief a very confused account of the dates, and I went through the whole story again with her in order to satisfy myself what the real sequence of events was, and she gave, or, put more accurately, she emphasized in the course of this second statement this fact, that whereas she had said very emphatically for two years or more she had absolutely refused to consider her husband's request that she should divorce him on any terms whatever, the situation changed from her own personal point of view in January, 1937. She had an opportunity then of disposing of the lease of the business which she was conducting entirely independently of her husband, and was proposing to take advantage of this and go back into the hotel service in which both she and her husband had been engaged, and she came

(1) (1909) 25 Times L. R. 662.
(2) (1920) 90 L. J. (P.) 28.
(3) [1895] P. 7.

to the conclusion that it was in her own interest that she should be free; and when the husband got into touch with her again a month or so later she realised then more strongly that if she was going back into the hotel business as manageress she could not afford to have her husband habitually ringing up, bothering her to take divorce proceedings. She thought—I think very naturally—that it would jeopardize her career.

Accordingly I am satisfied, and I find as a fact, that she had definitely decided on her own account and for her own reasons that she would take divorce proceedings. Of course that of itself is not decisive, if notwithstanding that decision and in order to carry it into effect, she nevertheless afterwards made a collusive bargain, and I am bound to say that the state in which things were left in March, that she would think it over, that the husband undertook that evidence would be forthcoming whenever she made up her mind, coupled with the conversation in September and this most unfortunate arrangement by which she accepted the money, while at the same time undertaking to conceal it from her solicitors, has given me the gravest anxiety about this case, having regard to the duty which the statute imposes upon me, not indeed for the first time, though it may be that now the burden of satisfying the Court is more strongly placed upon the parties.

But after thinking it over carefully I have come to the conclusion that the reality of the matter is that she never really made any bargain at all. It is quite true that she would have been in difficulty—not, I think, in insuperable difficulty—in finding the money to start proceedings; but I think that she would have done it, and could have done it, apart altogether from this offer of her husband. It was a most unwise and dangerous thing to do. In *Carmichael* v. *Carmichael* (1) Lord Merrivale said that every transaction either between the parties or between their legal advisers during the pendency of divorce proceedings—and I would add, in contemplation of pending divorce proceedings—which

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(1) 42 Times L. R. 133.

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makes material elements of the decree of divorce subject of negotiations, taints the transaction with the suspicion of collusion and must be avoided both by the parties and by their representatives. But I have come to the conclusion that I can fairly find in this case that, in fact, she never made any bargain to bring the proceedings at all. She was determined to bring proceedings. She did accept this money but she never, in fact, made any arrangement that in consideration of that money she would bring proceedings. I think that is the real truth of the matter, and as I have come to that conclusion I can fairly say that I am satisfied this petition was not presented in collusion.

In due course, when this matter came out, the solicitors, as I have already said, dealt with the situation with perfect propriety, and I am satisfied that all material facts have been laid before me. I said a short time ago that disclosure by itself cannot validate a bargain if that which is disclosed is of itself a collusive bargain; but it is only fair to say that if the matter is susceptible of a sinister or of an innocent interpretation the fact that a full and candid disclosure has been made, as I think it has been made in this case, does, or at least may, enable the Court to adopt a more charitable view. I had considerable doubt in the first place, but after careful consideration I find that I am able to pronounce a decree in this case, and I do so with costs.

Solicitors: *Freke Palmer, Romain & Romain.*

W. L.

1938
March 14, 21.

GOWER *v.* GOWER.

Divorce—Husband respondent's application for decree absolute—Wife petitioner's delay—Financial motive—Husband's non-payment of costs—Contempt not contumacious—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 9.

Where a wife petitioner who had been granted a decree nisi of divorce refrained from making it absolute for over two years because she thought that she would suffer financially, her application for a decree of judicial separation instead was refused and the application of the respondent under s. 9 of the Matrimonial Causes Act, 1937, that the decree be made absolute was granted.

Principle in *Hunter* v. *Hunter* [1934] P. 92 followed.

Also *held*, the husband's contempt in not paying certain costs was not contumacious so as to bar his remedy: *Leavis* v. *Leavis* [1921] P. 299.

Motion by respondent husband for leave to make decree nisi of divorce absolute. Cross-motion by wife petitioner to convert decree nisi into one of judicial separation.

The wife presented a petition for divorce on June 14, 1930, and a decree nisi was pronounced on January 23, 1935, but she took no steps to have it made absolute.

Talbot Dyer for the respondent. The petitioner has deliberately held up the decree absolute because of financial reasons and the fear that her interests under the will of her husband's father will suffer. This is not a sound reason for not making the decree absolute, as is made clear by the President in *Hunter* v. *Hunter.* (1) The respondent is entitled under the Matrimonial Causes Act, 1937, s. 9 (2), to a decree absolute in the circumstances.

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(1) [1934] P. 92.

(2) 1 Edw. 8 & 1 Geo. 6, c. 57, s. 9, provides: "Where a decree "nisi has been obtained, whether "before or after the passing of "this Act, and no application for "the decree to be made absolute "has been made by the party who "obtained the decree, then, at any "time after the expiration of three "months from the earliest date on "which that party could have "made such an application, the "party against whom the decree "nisi has been granted shall be at "liberty to apply to the court and

Eric White for the petitioner. The respondent is barred from his remedy because he has not paid 120*l.* costs which he was ordered to pay. In circumstances like these financial reasons may justify the conversion of the decree of divorce into one for judicial separation, as shown by *Daglish* v. *Daglish.* (1)

Dyer in reply. The respondent's contempt is only technical, and on the authority of *Leavis* v. *Leavis* (2) does not debar him from exercising his statutory right.

1938. March 14. HENN COLLINS J. I will deal first with the petitioner's motion. So far as the facts are concerned I think that the spring and motive of the petitioner is purely financial. I cannot do better in these circumstances than guide myself by the words of the learned President in *Hunter* v. *Hunter* (3), in which he said: "I should view with "disfavour any case in which I was satisfied that there had "been a deliberate holding up of the decree absolute or a "deliberate failure to prosecute the petition after decree nisi "for the purpose of extracting terms more favourable to the "petitioner than those contemplated when the decree nisi "was pronounced." I think that those words exactly express not only the proper conclusion of the law, but my conclusion on the facts of this application, and I make no order on the petitioner's motion. With regard to the respondent's motion to make absolute the decree nisi it is said that it should not be granted because he has not paid the costs. It is quite true that he is in contempt in that respect; but I am also satisfied, by the case of *Leavis* v. *Leavis* (4), that this is a matter for my discretion. In that case Hill J. said: "I "have come to the conclusion that it is a matter of discretion "for the Court to consider, upon all the circumstances of the "case, whether the summons of the respondent should be "heard and that it is matter material to the exercise of that

"the court shall, on such application, have power to make the "decree absolute, reverse the "decree nisi, require further inquiry or otherwise deal with the "case as the court thinks fit."

(1) [1936] P. 49.

(2) [1921] P. 299.

(3) [1934] P. 92, 94.

(4) [1921] P. 299, 301.

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"discretion to consider whether those circumstances are due "to the fault or to the misfortune of the respondent." I have an affidavit of the respondent which discloses his means, and they appear to be solely his pension as a retired captain in the Army of 157*l*. a year, out of which he has been paying something like half under the orders of the Court for his wife's maintenance. I cannot help thinking that his failure to pay the costs is on account of his inability to do so and is not contumacious. In those circumstances I exercise my discretion in his favour, and the result will be that the decree will be in the list in a week's time.

March 21. Decree absolute pronounced.

Solicitors: *Francis & Crookenden; Reid Sharman & Co.*

W. L.

THE TERNEUZEN.

1938
March 16,
17, 25.

Shipping—Wages—Wreck—Termination of service before date contemplated in agreement—Merchant Shipping (*International Labour Conventions*) *Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 42), *s.* 1.

On January 27, 1937, the defendants' steamship was driven ashore in a storm and remained fast. Ineffectual salvage operations were undertaken, and between February 16 and 24 most of the crew were discharged. On April 14 the salvors abandoned their efforts, and on May 5 the remainder of the crew, including the plaintiff, who was the chief officer, were paid off and the ship was abandoned as a total loss. Notice of abandonment as a constructive total loss had already been given to the underwriters on February 3.

The plaintiff, who had been unable to obtain other employment, claimed two months' wages under s. 1 of the Merchant Shipping (International Labour Conventions) Act, 1925, which provides that " when by reason of the wreck or loss of a ship on which a " seaman is employed his service terminates before the date " contemplated in the agreement, he shall . . . . be entitled, " in respect of each day on which he is in fact unemployed during " a period of two months from the date of the termination of the " service, to receive wages at the rate to which he was entitled " at that date."

The defendants alleged that the plaintiff's services under his agreement were terminated on January 27 by reason of the wreck of the vessel, and that, having been paid at the same rate as under the agreement up to May 5, he was not entitled to anything more :—

Held, following the definition of " wreck " laid down by the Court of Appeal in *The Olympic* [1913] P. 92, that the injury to the ship which is alleged to have terminated the services must be such as to make the continuance of the voyage useless as a commercial venture, that the loss of the venture was not to be determined ex post facto only by the condition and position of the ship at the moment the casualty occurred ; that there was no wreck until the venture was in fact abandoned by force of circumstances on May 5 ; and, therefore, that the plaintiff was entitled to the sum claimed.

Claim for wages.

The plaintiff, Charles Frederick Marsh, a master mariner, who was serving as chief officer of the steamship *Terneuzen*, claimed against Lensen Shipping, Ld., the owners of the vessel, 36*l.* 10*s.*, being two months' wages alleged to be due under s. 1 of the Merchant Shipping (International Labour

Conventions) Act, 1925, by reason of the wreck of the *Terneuzen*, which terminated his employment.

That section provides that: "When by reason of the "wreck or loss of a ship on which a seaman is employed his "service terminates before the date contemplated in the "agreement, he shall, notwithstanding anything in s. 158 of "the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on "which he is in fact unemployed during a period of two months "from the date of the termination of the service, to receive "wages at the rate to which he was entitled at that date."

The claim had been brought before the court of summary jurisdiction at Guildhall Justice Room, when the magistrate, in exercise of his powers under s. 165 (iii.) of the Merchant Shipping Act, 1894, referred the claim to the Admiralty Division of the High Court of Justice.

According to the deposition of the plaintiff made at Guildhall, he signed articles as chief officer on December 21, 1936, at 18*l*. 5*s*. a month. While sailing in ballast from Flushing to Setubal the ship encountered bad weather, and on January 27, 1937, was driven ashore at Setubal. Ineffectual efforts by salvage vessels to get the ship off were made over a period of two and a half months. Between February 16 and February 24 the whole of the crew, except seven, were paid off; among the seven remaining was the claimant. He was paid off on May 5, 1937; wages ceased on that day, and he had not been able to obtain any other employment. If the ship had not been wrecked, the plaintiff said that he would have expected the articles to run to June 30, 1937, and then he would probably have signed on again under new articles.

Notice of abandonment of the ship as a constructive total loss was given to the underwriters on February 3. The salvors discontinued their efforts on April 14, and the ship was in fact abandoned as a total loss on May 5, when the master and all the remaining members of the crew left her.

J. V. Naisby for the plaintiff. The plaintiffs' services in fact terminated on May 5, by reason of the fact that the vessel on which he was serving was wrecked or was a wreck. The date of the notice of abandonment is immaterial. The question whether and when there was a wreck depends on the facts and not on the view taken by ship owners and underwriters: see *Lloyd* v. *Sheen.* (1)

The plaintiff was actually working on board the ship until May 5, and was paid wages up to that date. If the defendants' contention is right, and the *Terneuzen* became a wreck on the day she went ashore, a seaman would be no longer under any obligation to serve or obey the orders of the master, his services would have terminated and he could leave the ship although she might be salved the next day. It was not until May 5 that the ship was finally abandoned, and it was realized that she was a wreck in the sense that the further continuation of the voyage was useless as a commercial venture; that is the determining factor: see the observations of Vaughan Williams L.J. in *The Olympic* (2), a case decided under s. 158 of the Merchant Shipping Act, 1894; but the same meaning must be given to the word "wreck" in the present Act. Even if the services are terminated "by reason of the wreck or loss" of the ship a day "before the date contemplated in the agreement" a seaman is still entitled to two months' wages from the date of the premature termination of the service: see *The Croxteth Hall.* (3) It is really immaterial when the vessel actually became a wreck; the plaintiff's services terminated "by reason of" the wreck and they only terminated on May 5.

Lord Reading K.C. and *Harvie Watt* for the defendants. "Services" mean services under the articles of agreement, and those services terminated on January 27 when the ship got into a position from which she never moved. She was just as much a wreck on that date as on May 5 or on any intermediate date, and within the definition of a "wreck" laid down in *The Olympic* (2) she was a wreck on January 27. At the time she went ashore the commercial adventure was in fact at an end. It is immaterial whether the further performance of the contract becomes impossible of fulfilment by running ashore or by detention of the vessel in an enemy port (*Horlock* v. *Beal*) (1) or destruction by an explosion (*Collins* v. *Simpson Steamship Co.*) (2), the principle is the same. In *The Olympic* (3) that ship was only out of commission nine weeks, but she was held to be a " wreck."

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(1) (1905) 10 Asp. Mar. Law Cas. 75.

(2) [1913] P. 92.

(3) [1930] P. 197, 201, and (sub nom. *Ellerman Lines, Ld.* v. *Murray*) [1931] A. C. 126.

It is not suggested that the plaintiff is not entitled to payment after January 27, and he was in fact paid, but he was not entitled to wages under the ship's articles. He received more than the equivalent of two months' wages under the articles and is entitled to nothing more. In *The Croxteth Hall* (4) the Court held that wages paid for the period between the date of the wreck and the date of discharge had to be deducted from the two months' wages payable under the statute.

The master is only entitled to discharge the crew under proper conditions for some good reason (*The Elizabeth*) (5) and apart from illness the only ground is the wreck or loss of the ship, and it was on this ground that the master of the *Terneuzen* discharged nearly all the crew in February, although at that time salvage operations were still going on.

It is not suggested that the crew have no duty to stand by : see *The Warrior* (6) ; they must not desert the ship and must obey the master's orders, but if by reason of the wreck the voyage has terminated, the agreement under the articles has also terminated, and the crew's duty is an implied duty, and payment for its performance, although no doubt at the same rate as wages under the articles, is really in the nature of a quantum meruit.

[Reference was also made to *Barras* v. *Aberdeen Steam Trawling and Fishing Co.* (7) and *Maver* v. *Owners of Steam Trawler "Solon."* (8)]

Naisby in reply. When a vessel goes ashore circumstances may arise which may give the master the right to discharge the crew, but there is not an automatic discharge when the vessel goes ashore, however badly wrecked she may be. In

(1) [1916] 1 A. C. 486.
(2) (1907) 24 Times L. R. 178.
(3) [1913] P. 92.
(4) [1930] P. 197.
(5) (1819) 2 Dods. 403.
(6) (1862) Lush. 476.
(7) [1933] A. C. 402.
(8) (1929) 34 Ll. L. R. 427.

all the reported cases the crew have always been paid according to the wages agreed in the ships' articles. The defendants are seeking to imply a new contract on the same terms as in the agreement. In *The Warrior* (1), Dr. Lushington put the obligation to stand by on the contract. It is significant that the statute does not say terminated "by" the wreck, but "by "reason of" the wreck, and "by reason of the wreck" the services terminated on May 5.

Cur. adv. vult.

1938. March 25. HENN COLLINS J. read the following judgment: This action comes before the High Court in pursuance of a reference by the magistrate under s. 165 (iii.) of the Merchant Shipping Act, 1894.

The plaintiff's claim is founded upon s. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925; and the circumstances which give rise to it are as follows: The plaintiff was serving as mate on board the s.s. *Terneuzen* under articles relating to a voyage or voyages between certain degrees of latitude trading to and fro as required, term not to extend beyond June 30, 1937, or the first arrival of the ship in the United Kingdom after such date or the discharge of cargo consequent upon such arrival.

The date upon which his services would in the ordinary course have ceased was therefore on or shortly after June 30, 1937.

On January 27, 1937, the *Terneuzen*, while proceeding in ballast to the port of Setubal, was driven ashore by stress of weather near that port. Her hull was buckled, and her engines disabled; and despite the efforts of salvors to refloat her, she remained where she had settled. She was ultimately sold as she lay in the interests of whom it might concern. Meanwhile the whole crew continued to render such services as were required of them until February, when between the 16th and 24th some were discharged, while the others, including the plaintiff, continued to serve until May 5, 1937, when the remaining men, including the plaintiff, were paid off, in pursuance of the owners' decision to abandon the ship.

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(1) (1862) Lush. 476.

The plaintiff was unemployed for a period after May 5, which, in terms of money, is correctly represented by the amount of his claim in this action, namely, 36*l.* 10*s.*

The section under which his claim is made is in these terms.

[His Lordship read the section and continued as follows :]

The question therefore is as to the date from which the period of two months is to run, and this, in turn, depends on when the plaintiff's services terminated by reason of the wreck within the meaning of the section. Prima facie, one would suppose that his services, which no doubt means services under his contract, terminated when, by reason of what had happened he was discharged earlier than he would have been in the normal course. The plain purpose of the section seems to be to provide against a period of unemployment arising from curtailment of the contemplated voyage by reason of the wreck of the ship, and unless I am constrained by authority to defeat what I think is its purpose, I ought not to do so. That there was a wreck within the meaning of the section is admitted, as it had to be on the authority of *The Olympic*. (1) In that case, in construing the word " wreck " in s. 158 of the Merchant Shipping Act, 1894, where the word occurs in the same collocation as it does in the section under discussion in this case, Vaughan Williams L.J. defined it in these terms : "I think the word ' wreck ' means something less than total "loss. I think that, in determining whether the wreck in "question has terminated the service of the seaman, the "tribunal which has to determine this question must first "satisfy itself that the damage, which is alleged to have "terminated the service, is physical damage caused at sea by "perils of the sea to the ship ; and, secondly, that such "damage, although repairable, would make the ship unseaworthy for so long a time as to make the continuance of the "voyage useless as a commercial venture." And Buckley L.J. defined it in similar, though slightly narrower terms. It is to be observed that the definition postulates a concatenation of three circumstances ; perils of the sea, a physical injury

(1) [1913] P. 92, 103.

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to the ship and consequent frustration of the commercial adventure. That chain was completed in this case.

It is also to be observed that the Court in that case were not determining the point of time when the wreck occurred, and much less the point of time when the seamen's services were terminated by reason of it, but were only concerned to decide whether what had happened amounted to a wreck or a loss of the ship within the meaning of the section. The defendants say, however, that the wreck occurred uno flatu when the ship stranded, and that at that moment the venture was lost, the wreck accomplished, and the plaintiff's agreement ended. It is true that in the light of subsequent knowledge one can say that the ship was so stranded that the venture was ultimately lost, but it is equally true that if, on the stranding, the question had been put whether the venture was lost the answer would have been, No, because efforts to accomplish it were continued for long after the stranding. I do not think that the third link in the chain—the loss of the venture—is to be determined, ex post facto, only by the physical condition and topographical position of the ship at the moment the casualty occurs, but that account must also be taken of the reaction of the owners to circumstances which are not apparently fatal, or, in simpler language, that there is no wreck until the venture is in fact abandoned by force of the circumstances. In saying this I wish to guard myself from being understood to say that the question wreck or no wreck rests with the owners, for this would be to the contrary of what was said by Lord Alverstone in *Lloyd* v. *Sheen* (1): "It cannot mean that "the question whether there is a wreck or loss for this purpose "is to depend upon the particular view taken by the under-"writers; it has to depend upon the facts." But that passage does not exclude the action of the owners as one of the material facts to be considered, nor constrain me to say that the voyage was at an end at the time when all concerned were doing all they could to prosecute it. The date on which the vessel was finally and inevitably abandoned is taken, for the purpose of this case, as May 5, 1937. I can find nothing in the cases which

(1) 10 Asp. Mar. Law Cas. 75, 79.

have been cited which militates against this view, and if that were all I should conclude in favour of the plaintiff.

Before parting with the case, however, I ought to advert to another and dependent argument on which the defendants relied. They say that the wreck which occurred on January 27 put an end to the voyage and therefore to the plaintiff's service under his agreement, and that his services thereafter were rendered under an agreement to be implied, not from his articles of agreement, but from the relationship which those articles created. In my judgment this distinction is not supported by authority. It is true to say in general terms that the wages of a seaman cease on the wreck of his ship. See, for instance, the judgment of Scrutton L.J. in *The Celtic* (1); but if I am right in thinking that the wreck for this purpose has not taken place till the last link in the chain has been forged by the submission of the owners to the force of circumstances, it requires no implication either from the articles or from any more nebulous material to account for an obligation on the seamen to continue their services after the happening of such a misfortune as overtook the *Terneuzen*. If, however, the true view is that the wreck occurred at the moment the ship went ashore, then I think that the seamen served thereafter under an obligation to be implied from the articles. Not only is it essential to the safety of the ship that there should be such an obligation, so that there are ample grounds for implying it in order to give the articles a business efficiency, but I think that *The Elizabeth* (2), and *The Warrior* (3), both bear out that the obligation springs from the contract. Indeed, in *The Warrior* (3) Dr. Lushington said so in terms, and the comments both of Buckley L.J. in *The Olympic* (4) and of Kennedy L.J. in his dissentient judgment in the same case on *The Elizabeth* (2), enforce that view.

I therefore give judgment for the plaintiff for the amount claimed.

Solicitors for the plaintiff: *Rehder & Higgs.*

Solicitors for the defendants: *Botterell & Roche.*

(1) [1930] P. 197.

(2) 2 Dods. 403.

(3) Lush. 476, 482.

(4) [1913] P. 92.

E. C. M. T.

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Feb. 21, 22, 23, 24, 25; *March* 22.

Shipping—Collision—Overtaking and crossing rules—Vessel adjusting compasses—Regulations for Preventing Collisions at Sea, 1910, *arts.* 19, 21 *and* 24.

The plaintiffs' steamship *C. M.* and the defendants' steamship *M. R.* came into collision in Liverpool Bay. The *C. M.* sighted the *M. R.* two to three miles away bearing about 2 points on the port bow and heading in approximately the same direction as the *C. M.* The *M. R.* was engaged in adjusting compasses and was flying the appropriate two-flag signal "J.I."

About ten to twelve minutes before the collision, and when the vessels were nearly two miles apart, the *M. R.*, in the process of adjusting her compasses, had swung 8 points on to a heading which brought her at right angles to the course of the *C. M.*, so that the *M. R.* had the *C. M.* about 6 points on her starboard bow. The two vessels continued to approach each other at right angles, the *C. M.* at her full speed of about ten knots and the *M. R.* for a short time at half speed and thereafter at "slow," until they were less than a quarter of a mile apart. The *M. R.* then went full speed astern and a few seconds afterwards the *C. M.* hard-a-starboarded. Barely a minute later the vessels came into collision.

The plaintiffs' case was that the crossing rule (art. 19) applied, and that the *M. R.*, having the *C. M.* on her own starboard bow, should have kept out of the way. The defendants' case was that, the vessels having sighted each other while the *C. M.* was coming up with the *M. R.* from a direction more than 2 points abaft her beam, the overtaking rule (art. 24) applied; that on this assumption the *M. R.*, as the overtaken vessel, in continuing to carry out the manœuvre on which she was known to be engaged, was keeping her course and speed within the meaning of art. 21.

Her pilot and master also said that it was customary for all ships to keep clear of a ship adjusting compasses:—

Held, (*a*) following *The Banshee* (1887) 6 Asp. M. L. C. 221, that art. 24, like the other Collision Regulations, was not applicable until the time arrived when, if either ship did something contrary to the Regulations, danger of collision would be caused; that at two to three miles distance, when the *C. M.* first sighted the *M. R.*, the vessels had no concern with one another, and that it was not until some time after the *M. R.* got on to a heading at right angles to the *C. M.* that they would need to take any notice of each other; that as at that time the *M. R.* had the *C. M.* on her starboard bow the crossing rule applied, and that the *M. R.* was to blame for not keeping out of the way.

(*b*) That even if (which was doubtful) at the moment the *C. M.* acted, it could be proved mathematically that the collision could

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have been avoided if the *M. R.* had put her wheel hard-a-starboard as well as going full speed astern, no seaman would have been justified in attempting that action and no seaman would have been justified in relying on such action being taken, and that the *C. M.*, as the stand-on vessel, therefore was also in fault under the Note to art. 21 for not taking action soon enough. Both vessels therefore were to blame in the proportions of four-fifths to the *M. R.* and one-fifth to the *C. M.*

Held further (i.) that, although other ships were usually willing to extend a certain amount of courtesy to a ship flying the "J.I." signal, it imposed no obligation on a stand-on ship to do more than keep an extra good look-out to see that the courtesy was not being abused; (ii.) that assuming the overtaking rule had applied and the *M. R.* had been the stand-on ship, in altering speed and turning 8 points to starboard in the course of adjusting compasses, she was not "keeping course and speed" within the meaning of art. 21.

The Roanoke [1908] P. 231 (altering course to pick up a pilot) distinguished.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Clan Mackenzie*; the defendants were the owners of the steamship *Manchester Regiment.*

The collision took place in Liverpool Bay on the afternoon of October 23, 1937.

The *Clan Mackenzie*, a vessel of 6554 tons gross, was outward bound to South Africa with a general cargo. The *Manchester Regiment*, a vessel of 5989 tons gross, was bound from Manchester to Canadian ports with passengers and cargo.

The plaintiffs' case was that the *Clan Mackenzie*, on a course of S. 88 deg. W. true, was making about ten knots when the *Manchester Regiment* was particularly observed about two and a half miles away bearing about two points on the port bow, and approximately on the same heading as the *Clan Mackenzie.* She was flying the signal "J. I.," indicating that she was adjusting her compasses. A little later, as the *Clan Mackenzie* proceeded, those on board her observed that the *Manchester Regiment* was approaching the line of their course at about a right angle. The *Clan Mackenzie* kept her course and speed until the *Manchester Regiment* was seen to be continuing on the same heading, causing imminent risk of collision. Thereupon the wheel of the *Clan Mackenzie* was put hard-a-starboard and one short blast sounded. The *Manchester Regiment* answered with three short blasts, but continuing on at high speed struck the *Clan Mackenzie* with her stem a heavy blow on the port side, doing great damage.

According to the defence, the *Manchester Regiment* was heading about W. magnetic when the *Clan Mackenzie* was seen approaching astern, distant about three miles, and bearing about 1½ points on the starboard quarter. When the compasses had been adjusted on the westerly heading the *Manchester Regiment* was swung on to a heading of north magnetic so as to adjust her compasses on that heading, and the *Clan Mackenzie* was thereby brought about 6 points on the starboard bow, distant about two miles. Thereafter the *Manchester Regiment* continued with engines working at slow ahead on a northerly heading, and after an interval, during which the compasses were adjusted on her northerly heading and she was ready to swing on to an easterly heading, it was seen that the *Clan Mackenzie* was still coming on without giving any indication how she would pass the *Manchester Regiment.* That vessel accordingly kept her course and speed in the expectation that the *Clan Mackenzie* would pass astern of her. The *Clan Mackenzie,* however, came on at high speed, and when it was judged that collision could no longer be avoided by her action alone the engines of the *Manchester Regiment* were stopped and put full speed astern and three short blasts were sounded on her whistle. The *Clan Mackenzie* replied with one short blast and appeared to alter course to starboard, but failed to clear and struck the *Manchester Regiment's* starboard bow with her port side.

G. St. C. Pilcher K.C. and *Cyril Miller* for the plaintiffs.

K. S. Carpmael K.C. and *H. G. Willmer* for the defendants.

[The arguments are fully stated in the judgment. In addition to the cases there cited reference was made by the plaintiffs to *The Seaton* (1) on the application of the overtaking

(1) (1883) 9 P. D. 1.

rule (art. 24) (1) and to *The Echo* (2) on the meaning of "keeping course and speed"; and, by the defendants, to *The Tasmania* (3) on the duty of the stand-on ship maintaining her course.]

Cur. adv. vult.

1938. March 22. THE PRESIDENT (SIR BOYD MERRIMAN) read the following judgment: About 2.20 in the afternoon of October 23, 1937, in broad daylight, two large steamships, the *Clan Mackenzie* of about 6500 tons gross, and the *Manchester Regiment* of nearly 6000 tons gross, came into collision in Liverpool Bay, about two miles from the Bar light vessel at the mouth of the Mersey. The *Clan Mackenzie* was so severely damaged that she had to be beached on the Burbo Bank, where she became a total loss. It was only by what was literally last minute action on the part of both ships that a collision at right angles was avoided.

For about an hour before 2.20 the *Manchester Regiment* had been cruising round in Liverpool Bay, adjusting her compasses and flying the appropriate two flag signal, "J.I." For part of that time an oil tanker was similarly engaged in the same area; but, except that she may have affected one turning movement of the *Manchester Regiment* slightly, she may be ignored.

As is usual, but not obligatory, the compass adjuster was making the adjustments clockwise on the cardinal points, beginning with West on the standard compass. The adjustment of the standard compass took, on each heading, an

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(1) Art. 24: "Notwithstanding "anything contained in these "rules, every vessel, overtaking "any other, shall keep out of the "way of the overtaken vessel."

"Every vessel coming up with "another vessel from any direction "more than two points abaft "her beam, i.e., in such a position "with reference to the vessel which "she is overtaking, that at night "she would be unable to see "either of that vessel's side lights, "shall be deemed to be an over-"taking vessel; and no sub-"sequent alteration of the bearing "between the two vessels shall "make the overtaking vessel a "crossing vessel within the mean-"ing of these rules, or relieve her "of the duty of keeping clear of "the overtaken vessel until she "is finally past and clear."

(2) [1917] P. 132.

(3) (1890) 15 App. Cas. 223.

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appreciably longer time than the corresponding adjustment of the steering compass, that is to say about 5 or 6 minutes as compared with some 3 minutes. The actual adjustment was made while the ship was being run at "slow," to avoid vibration, but during the relevant time there had been three periods of 5 minutes each during which she had been run at "half-speed," probably in each case with a view to bringing her round more quickly on to a new heading.

[His Lordship then dealt with the speeds of the two vessels, and said that he found the speed of the *Manchester Regiment*, when she put her engines astern one minute before the collision, at not less than 5½ knots, and the speed of the *Clan Mackenzie*, which she kept up to the moment of impact, 10 knots. His Lordship continued as follows:]

From 1.44 to 1.57 the *Clan Mackenzie* was manœuvring to drop her pilot. The *Manchester Regiment*, on the other hand, was engaged in doing the last half of the process of adjusting her standard compass, and was actually seen by the 2nd Officer of the *Clan Mackenzie* heading between east and south. She had in fact also been noticed, before the pilot was dropped, by the master of the *Clan Mackenzie* at roughly 2 points on the port bow, and as she was then heading apparently W.N.W., and at two to three miles distance, and as she was making her adjustment clockwise, this was probably while she was making her first turn from a westerly heading to a northerly heading after adjusting the standard compass on west and, in point of time, would be between 1.32 and 1.40. At 1.57 the engines of the *Manchester Regiment* were put at "half-speed" as she turned after the adjustment of the standard compass on "south" to a westerly heading in order to begin the adjustment of the steering compass. At 2.02 the *Clan Mackenzie* was making to the northward of the Bar light vessel, and at that time the engines of the *Manchester Regiment* were put to "slow" and, having been delayed a little by clearing the tanker, she was steadying on a westerly heading for the second time. At 2.08 the *Clan Mackenzie* passed the Bar light vessel abeam on the port side at about a mile, and set her course S. 88 W. true. The

Manchester Regiment was already beginning to swing to the northward and was so seen by the master of the *Clan Mackenzie*, her 2nd Officer and her 4th Officer. Both the 2nd Officer and the 4th Officer thought that she was stopped in the water. The bearing of the *Manchester Regiment* at the time the *Clan Mackenzie* had steadied on her course was nearer 3 points than 2 points on the *Clan Mackenzie's* port bow. The 2nd Officer saw the " J.I." signal. He informed the 4th Officer but not the master.

By 8.10 the master of the *Clan Mackenzie* had gone to his cabin below the bridge in ignorance of the fact that the *Manchester Regiment* was flying the " J.I." signal. The 2nd Officer had gone to the chart room, having told the 4th Officer about the " J.I." signal, and had left him in charge of the bridge. The *Manchester Regiment*, on the other hand, had already steadied on her northerly heading.

The *Clan Mackenzie* was left in sole charge of the 4th Officer. That young man was spending the first quarter of an hour of his life as an officer in charge of the bridge at sea when he was confronted with the situation thus created. He had just passed his Board of Trade examination for a second mate's certificate. He was obviously an intelligent young man, but of necessity he had had no practical experience whatever as officer of the watch, as his superior officers well knew. If Mr. Carpmael is right in the contentions with which I shall have to deal presently, he was called upon to appreciate the novel point that in relation to a vessel which he had first seen with his own eyes establishing a course at right angles on his port bow, and with regard to which he had been told nothing to disabuse him of the notion, to which he adhered tenaciously, that she was a crossing vessel whose duty it was to give way, he was in fact in charge of an overtaking vessel, that the other ship in turning to starboard was keeping her course, and that all the time it was his own duty to keep out of the way.

On the other hand, if Mr. Pilcher is right in his contentions, this young officer was called upon to make the decision which generations of judges have acknowledged is the most difficult which an experienced sailor is called upon to make—namely, an appreciation of the precise moment at which the stand-on vessel must abandon her obligation to keep her course and speed and take some action to avoid an impending collision. Though in fact it was this inexperienced officer who was left in charge of the situation, it cannot be, nor has it been, contended that the standard of care and judgment required is to be decided in relation to his individual qualifications. The standard is objective and impersonal. In this respect the analogy to *McCrone* v. *Riding* (1) decided by a King's Bench Divisional Court in relation to the standard of care required of a learner in charge of a motor-car appears to be complete.

The master of the *Clan Mackenzie* said that if he had known of the " J.I." signal he would probably have stayed on the bridge, as he would have had an idea that the other ship might want watching. But he had the same opportunity of seeing that a two flag signal was flying as the 2nd Officer had; and in any case the 2nd Officer could have told the master before he left the bridge what the signal was; or, if he did not consider it necessary to do this, he might at least have done as the master himself would have done had he known of the signal, and kept an eye on the situation himself, instead of leaving the bridge to the 4th Officer. I cannot help feeling that some lack of co-ordination and discipline is here apparent.

Soon after 2.10 the 4th Officer appreciated that the *Manchester Regiment* was in fact under way approximately at right angles to his own course; and as the minutes passed he realized that the ships were getting closer, that the bearing was not changing, and that risk of collision was, therefore, arising. Meanwhile, as regards the *Manchester Regiment*, the adjustment of the steering compass on " North " had been completed. That was before the situation had become really dangerous, though there was, of course, by that time " risk of "collision." But though the *Manchester Regiment* could have stopped her engines, or have reversed her engines, with or without starboarding her wheel, or have turned away to port and come round on to an easterly heading anti-clockwise,

(1) (1938) 54 Times L. R. 328.

with perfect safety and without any serious interference with the operation of adjusting compasses, those in charge of her allowed her to go straight ahead without reduction of speed, at right angles to a vessel which was obviously coming on at "full speed," hoping against hope that for some reason or another the other vessel would do something.

At 2.19 the master and the pilot of the *Manchester Regiment*, having for several minutes seen the *Clan Mackenzie* coming on as I have just described, appear simultaneously to have made up their minds that it was time to act. They both went to the telegraph and one or other of them rang the engines "full astern," giving at the same time the regulation three blasts. The 2nd Officer noted the time, and with his watch still in his hand ran to the edge of the bridge where he saw the *Clan Mackenzie* very close, and at the same moment saw the steam from her whistle and heard the one short blast which was then given by the *Clan Mackenzie*. In respect of the order in which these signals were given I accept the evidence of the witnesses on the *Manchester Regiment* that her signal was given first, though there was only a lapse of a few seconds between the two, and I reject the evidence from the *Clan Mackenzie* that it was she who first gave a whistle signal. The significance of the attempt by the witnesses of the *Clan Mackenzie* to reverse the order will be apparent when it becomes necessary to discuss her share of the responsibility for this collision.

The explanation of the *Clan Mackenzie's* signal is as follows: The 4th Officer, still in sole charge of the bridge, had begun to feel a little nervous about the approach of the *Manchester Regiment*, estimating the distance of the vessels apart to be about half a mile. He was just thinking that it would be wiser to call the 2nd Officer from the chart room when the master came out of his cabin on to the port side of the deck and saw practically the same situation as the 2nd Officer of the *Manchester Regiment* had seen a moment or two earlier. He leapt on to the bridge, rushed to the wheel-house, ordered the wheel hard-a-starboard and blew one short blast. Mr. Pilcher asks me to find that by a fortunate chance, or fluke, the master happened to come on to the bridge at the precise moment, neither sooner nor later, which a prudent sailor would have selected as the moment at which to take the action the stand-on ship is obliged by the rules to take, when the give-way vessel can no longer avoid collision by her own action alone. This contention will have to be examined in its turn.

[His Lordship then dealt with the evidence as to the distance between the vessels at this time—one minute before the collision—which he found to be under a quarter of a mile; and after stating that the angle of the blow was between 42° and 45°, that the forward speed of the *Manchester Regiment* had been reduced by about 2 knots as the result of her engines working astern, and that her speed at the moment of impact was about 3½ knots, continued as follows:]

In connection with her speed I have had evidence from the rival surveyors called on either side. So that I may not be misunderstood with regard to the services which these persons, eminent in their profession, are capable of rendering, and have rendered in this case, I have no doubt that subject to the qualifications which I have already mentioned, the conclusions that they draw from the survey as to the approximate angle of the blow have saved a good deal of unnecessary conflict of evidence. I have also no doubt that their survey will be extremely useful when the appraisement of damage comes to be made. But, for the third or fourth time this term, I have witnessed the spectacle of two eminent surveyors, upon precisely the same data, asserting with every possible assurance that these data prove widely differing conclusions in respect of speed. This is by no means the most glaring instance of divergent views; but the surveyor for the *Clan Mackenzie* asserted that the speed of the *Manchester Regiment* must have been 5 to 6 knots at the moment of impact. The surveyor for the *Manchester Regiment* on the other hand asserted, on precisely the same material, that it could not have been more than 1 to 2 knots.

He called attention to the fact that there was no buckling of the plates on the starboard bow and no actual holing of the side of the *Clan Mackenzie*, as he would have expected if the *Manchester Regiment* was doing 5½ to 6 knots. But, assuming that to be so, I am bound to say that, although he was given several opportunities of making the attempt, he did not succeed in convincing me that there was any reason why the damage actually done should indicate a speed of 1 to 2 knots, rather than 2 to 3 knots, or even 3 to 4 knots. I must say that this much too familiar spectacle is not very edifying. It was to meet this kind of situation that the Rule Committee recently passed Order XXXVII.A, and this Court may have to consider whether it will not be necessary to use its powers of invoking the assistance of a Court expert. For the moment it is sufficient to say that in this case I have not been assisted, in the matter of speed, by the expert evidence.

I must now state the rival contentions. Mr. Pilcher contended that the rule applicable is the crossing rule, and that on this basis the master of the *Clan Mackenzie* acted at the right moment in accordance with the duty imposed on the stand-on vessel: he contended, alternatively, that if he was the overtaking ship and, therefore, bound to give way, the *Manchester Regiment* had not acted in time under the rules. Mr. Carpmael, on the other hand, contended that as the *Manchester Regiment* was first seen from the *Clan Mackenzie* at about 2 or 3 points on her port bow at a distance not exceeding three miles, and on approximately the same heading, the *Clan Mackenzie* was an overtaking vessel within the meaning of the rules; that by virtue of the overtaking rule itself she could never lose the character of the overtaking ship, and was, therefore, obliged to keep out of the way. As regards the *Manchester Regiment*, as the overtaken vessel, he contended that she was engaged on the well known nautical manœuvre of adjusting her compasses, which necessarily involved successive changes of heading, and that in making the change from a westerly to a northerly heading she was keeping her course and speed as the overtaken vessel, and did not bring the crossing rule into play. At one time he even went so far as to suggest that a further turn on to an easterly heading, provided it was done in the course of adjusting compasses and not on a return to the Mersey, would still leave the *Manchester Regiment* the overtaking vessel though they were in fact meeting head on. But he subsequently qualified this apparently absurd result of his contention by saying that in such case the *Clan Mackenzie* would no longer be " coming up with " the *Manchester Regiment*. He called attention to the difference between arts. 17, 18, 19 and 20 on the one hand and art. 24 on the other. With regard to the first four rules he pointed out that the words " so as to involve "risk of collision " occurred in every one, and he laid special stress on the preliminary headnote to the Steering and Sailing Rules, which indicates that risk of collision can be ascertained by the fact that the bearing of an approaching vessel does not appreciably change, which would not apply to a vessel being overtaken. In art. 24, on the other hand, he pointed out that risk of collision was not mentioned at all, but that the test was that a vessel was coming up with another from any direction more than 2 points abaft her beam, and this, he contended, was a mere matter of visibility, whether by night or by day. Mr. Carpmael further contended that, if he could not maintain that rule 24 applied in all circumstances, independently of risk of collision, there was in this case risk of collision even when the *Manchester Regiment* was two and a half to three miles away on a westerly heading, because the fact that she was flying the " J.I." signal indicated that she would shortly be turning on to a northerly heading, that risk of collision was, therefore, established in the overtaking position, and that the *Clan Mackenzie*, being once an overtaking vessel, remained always an overtaking vessel.

He also reserved the point that the " J.I." signal itself, apart from the Regulations, obliged the *Clan Mackenzie* to keep out of the way. He admitted that he had no authority in support of the proposition, and that what authority there was was to the opposite effect (see *The Treherbert* (1)), and, therefore, that it would be impossible for me to accept this contention, even if he could persuade higher authority to do so.

He further contended that if, as the overtaken vessel, the *Manchester Regiment* could not be said to have maintained her course, so as to absolve the *Clan Mackenzie* from an

(1) [1934] P. 31.

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absolute duty to keep out of the way, the latter had the ordinary duty to take care to avoid the collision, as laid down in *The Saragossa* (1), and affirmed that she had been negligent in this respect.

Finally, if all these contentions failed, and he was to blame as the " give-way " ship, he contended that the *Clan Mackenzie* had herself acted too late.

I asked Mr. Carpmael to give me any authority for the proposition that art. 24 comes into operation under conditions differing from those applicable to the earlier articles and that it is not qualified by implication by the words appearing in the earlier rules: " so as to involve risk of collision." He admitted that he could give me no such authority, but he maintained that the proposition was self-evident from the wording of art. 24 itself. I am bound to say that, even if the matter were, as I think it is not, entirely free of authority, I should come to exactly the opposite conclusion. I should have thought it was reasonably clear from the opening words of art. 24, "notwithstanding anything contained in these "Rules", that all the Steering and Sailing Rules became applicable in the same conditions, namely in relation to risk of collision, but that art. 24 contained an overriding exception, laying down that, when once the rules have become applicable in relation to risk of collision, the relations between an overtaking and an overtaken vessel shall not be changed by any subsequent alteration of bearing so as to leave it indefinite whether, for example, at any given moment the overtaking or the crossing rule applies. But the matter is, in my opinion, concluded by authority. In *The Beryl* (2) Lord Esher laid it down that these rules are all applicable at a time when the risk of collision can be avoided, not that they are applicable when the risk of collision is already fixed and determined. He added: " We have always said that the right moment of "time to be considered is that which exists at the moment "before the risk of collision is constituted." In *The Bellanoch* (3) Kennedy L.J. said: "Nobody can dispute, in this

(1) (1892) 7 Asp. M. L. C. 289.
(2) (1884) 9 P. D. 137, 140.
(3) [1907] P. 170, 192.

"Court" (that is the Court of Appeal), "the judgment which "has been given in the case of *The Beryl* (1), which dealt "authoritatively with the question of the time at which a "vessel, with whom a duty to act lies, ought to take steps, in "accordance with the rules, to fulfil her duty, and nobody "disputes that the time is when it is, or ought to be, apparent "that there will be risk if nothing is done to prevent it." But it is said that these were both cases of crossing vessels. However, in the earlier case of *The Banshee* (2), an overtaking case, Lord Esher M.R. had said: "Now at what period of time is it "that the Regulations begin to apply to two ships? It cannot "be said that they are applicable however far off the ships may "be. Nobody could seriously contend that, if two ships are "six miles apart, the Regulations for Preventing Collisions "are applicable to them. They only apply at a time when, if "either of them does anything contrary to the Regulations, "it will cause danger of collision. None of the Regulations "apply unless that period of time has arrived. It follows "that anything done before the time arrives at which the "Regulations apply is immaterial, because anything done "before that time cannot produce risk of collision within the "meaning of the Regulations."

There is nothing in any of these observations, by which I am bound, which hints at any difference between the overtaking rule and the other rules as to the moment at which they apply. The test is stated in different forms, but with no difference in substance, and it is applied universally; nor is there anything in the case of *The Banshee* (2) itself to give the slightest warrant for Mr. Carpmael's contention that mere visibility is the test for the applicability of rule 24. Indeed in the circumstances of that case the Court of Appeal held that, though the vessels had been in sight of each other for some time, the Regulations had not begun to apply when the overtaking was within 800 yards of the overtaken vessel. But although 800 yards was taken in that case as being a distance at which the rules had not begun to apply, I appreciate that that finding is not to be applied arbitrarily; for example,

(1) 9 P. D. 137, 140.

(2) (1887) 6 Asp. M. L. C. 221, 222.

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nothing is said in the report about the relative speeds of the vessels, though it appears that both were small ships. It is obvious that the distance astern at which the overtaking rule becomes applicable must vary according to circumstances. Eight hundred yards astern may be a long distance between two tramps steaming respectively at six and seven knots, but it would be a very short distance if the *Queen Mary*, at speed, was overhauling one of them. Likewise the lateral interval between the courses would be a factor of importance. It is the principle laid down in *The Banshee* (1) and the other cases which matters.

With that principle in mind I will now examine Mr. Carpmael's submission in light of the circumstances of this case. He argued that, as the master of the *Clan Mackenzie* admitted that he had seen the *Manchester Regiment* roughly 2 points on his port bow at two to three miles, the overtaking position was established once and for all within the meaning of art. 24; and, although his own pilot and master did not help him, he was able, as will appear, to invoke some admissions from the rival master, in aid of his argument.

Now, if it be assumed that vessels are on exactly parallel courses, that the hindermost vessel is two and a half miles from the point at which she would be opposite the leading vessel, and that the lateral interval is a mile, she has the leading vessel about two points on her port bow. The distance between the two ships is, of course, considerably more than two and a half miles. At the supposed speeds of ten and six knots respectively, in fifteen minutes the hindermost vessel will have covered the two and a half miles to the point opposite the original position of the leading vessel; but the leading vessel has moved forward one and a half miles, the bearing has broadened correspondingly, and the ships are still well over one and a half miles apart. After another quarter of an hour the hindermost vessel is still half a mile astern of the position in which she would be opposite the other vessel. She has the leading vessel just under 6 points on her port bow and they are still over a mile apart. Even in this last position I am advised, as a matter of seamanship, that the two vessels would have no concern with each other at all, and that from the seaman's point of view it would be absurd, in the original position half an hour earlier, to treat them as being affected by any of the Steering or Sailing Rules. But as a matter of fact when the *Manchester Regiment* was actually on a westerly heading she was on West, magnetic ; but when some minutes later the *Clan Mackenzie* took up her course S. 88 W. true, her magnetic heading is stated to have been N. 77 W. Had these vessels continued on these respective headings they would have been, not on parallel courses, but on courses diverging by about a point, so that the lateral interval would be increasing all the time and the vessels would be by that much the less concerned with each other.

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(1) 6 Asp. M. L. C. 221.

In his argument on this point Mr. Carpmael referred me to the following passage at p. 428 of the article on Shipping in the original edition of Halsbury: "The time to look at is, "therefore, intermediate between the time when collision "is a mere possibility and the time when the risk is "immediate. The rules referring to risk of collision apply as "soon as there is a reasonable probability of risk of collision."

While maintaining that this summary of the law does not apply to art. 24 because that is not a rule referring to "risk of "collision," he very frankly admitted that, if the circumstances in which art. 24 applies are governed by the principle laid down in *The Beryl* (1) and the other cases to which I have referred, it would be impossible to say of two ships steaming on parallel courses, as described in the illustration just given, that in their first position they had passed out of the time when collision was a mere possibility and into the intermediate period between that time and the time when the risk is immediate. But he contended that, even if this was an approximate illustration of the position when the *Manchester Regiment* was first seen, it had no bearing on the case by reason of the admission, which he obtained from the master of the *Clan Mackenzie*, to the effect if he had known that the other ship was flying the " J.I." signal he would probably have stayed

(1) 9 P. D. 137.

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on the bridge, because he would have had an idea that she might want watching. Therefore, even if risk of collision must exist before art. 24 applies, Mr. Carpmael argued that this admission proved that risk of collision already existed when the master of the *Clan Mackenzie* last saw the *Manchester Regiment* before leaving the bridge, and that it followed that the *Clan Mackenzie* was the overtaking vessel, because, during the early part of the turn by the *Manchester Regiment* to a northerly heading, the *Clan Mackenzie* must be still more than 2 points abaft her beam.

Now I think that this argument involves a fallacy, which is that, fairly interpreted, the master's admission of potential danger was not made in relation to a ship which had altered her course in the ordinary course of navigation about two miles ahead, as is shown by the fact that he actually left the bridge because he was unaware of the " J.I." signal ; but was made in relation to a ship of which it was assumed to be known that she was actually turning in the course of the compass adjusting operation, first on to a course crossing his course at right angles and thence possibly on to an opposite course to his. This does not involve an admission that he left the bridge at "the moment before the risk of collision was con-"stituted." This may be tested by seeing what would be the position at the end of the ten minutes after the master of the *Clan Mackenzie* left the bridge on the assumption that the situation, when he did so, was as it must have appeared to him to be ; that is to say, the lateral interval still being assumed at that moment to be a mile, that his vessel has now reached a point only ten minutes steaming, or one and two-thirds miles, from the point at which she will be opposite the leading vessel, the bearing of which has broadened correspondingly to about 30°, and which has just turned from a westerly heading 2 or 3 points in a northerly direction and is assumed to be continuing on that new heading whatever it may be. An alteration of course of 2 points from her heading West magnetic puts the *Manchester Regiment* on a course approximately one point off the parallel courses. In those ten minutes the *Clan Mackenzie* would have done the mile and two-thirds to the point opposite that in which the *Manchester Regiment* is assumed to have been last observed by the master. In the same time the *Manchester Regiment* would have done one mile and would be nearly that distance ahead at a lateral interval of well over two-thirds of a mile. The actual distance between the ships would still be over a mile. If she had turned 3 points, that is to say 2 points off the parallel course, she would still be not much less than a mile ahead, the lateral interval would be nearly two-thirds of a mile, and the distance between the vessels would still be over a mile. If she had gone off 4 points, that is 3 points from the parallel, she would be about five-sixths of a mile ahead, the lateral interval would be about one-third of a mile and the distance between the vessels would be just under a mile. If she had turned 5 points, that is to say 4 points off the parallel, an overtaking position would not be established by the turn unless it had been established already, as in this position the hindermost vessel would be less than 2 points abaft the beam. But, leaving this aside, at the end of the ten minutes the lateral interval would be just over a quarter of a mile, the leading vessel would be about two-thirds of a mile ahead and the distance between them would be over two-thirds of a mile. In none of these positions, whichever is the supposed heading of the leading vessel, am I advised, as a matter of seamanship, that they would have any concern with each other at the beginning, or for the major part, of that ten minutes; and I am of opinion that at the time when he left the bridge, in that supposed situation, the master of the *Clan Mackenzie* would be justified in thinking that the ship had not passed out of the stage in which collision was a mere possibility.

Fairly interpreted, the master's admission meant no more than that, assuming the situation when he left the bridge to be that which it actually proved to be, he would know that if the heading on north was maintained and the bearing did not change and the ships got within, say, about a mile of each other, a situation would arise in which the *Manchester Regiment* needed watching because it would be " intermediate "between the time when collision was a mere possibility and "the time when the risk was immediate." That time would be some four or five minutes after the *Manchester Regiment* had actually established her northerly heading, and five or six minutes before the collision; and in the view of the Elder Brethren, as a matter of seamanship, the time when the vessels were about a mile from each other, with five or six minutes to spare, is the earliest time at which they would need to take any notice of each other; and with that time, and at that distance, whichever of these vessels was obliged to do so could easily have kept out of the way of the other with perfect safety and with ample time to spare. Before that they would be just two ships in sight of each other. This happens also to be in accordance with the evidence of the pilot of the *Manchester Regiment*. Asked when he had first seen the *Clan Mackenzie* he replied that he had first seen her before she reached the Bar light vessel, but added that he was really "concerned "with" the oil tanker which was also going to adjust compasses. He also said that before the second adjustment he saw her but did not "examine" her; that would be while the *Manchester Regiment* was on a westerly heading between 2.02 and 2.08. Finally, in the early part of his cross-examination, speaking of the time when he had already turned on to the northerly heading, he said that he saw the *Clan Mackenzie*, but was "not concerned with her"—she was still to the east of him, coming on her course roughly about 1½ miles away and coming along at a good speed.

Seeing that the course at a right angle, to use a neutral phrase, had been established, as is conceded, not less than ten nor more than twelve minutes before the collision at a time when, as already stated, the one was one and two-thirds miles from the point of intersection, the other very little less than a mile, and the distance between them was very nearly two miles, I have no hesitation whatever in holding that, in these circumstances, it is not the overtaking rule, but the crossing rule that, in accordance with the principles laid down by the Court of Appeal, must be applied to this case. If further authority is needed I think that it is provided by *The*

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Roanoke (1), which Mr. Carpmael cited in support of the proposition with which I shall next have to deal. The point for which I am now referring to the case was not the subject of the decision in the Court of Appeal, because there was no appeal from the decision of the late Bucknill J. on this point. The actual point of the decision was whether the *Roanoke*, going into Dungeness East Bay to pick up a pilot and reducing speed for that purpose, was keeping her speed in relation to the *Windsor*, which had gone into the bay just ahead of her for the same purpose, but was coming out of the bay in a position which made her the give-way vessel on crossing courses. But in the Court below it had apparently been contended, as Mr. Carpmael now contends, that all the time the *Roanoke* was an overtaking vessel because she had come up channel in full sight of the *Windsor* and astern of her. With regard to this Bucknill J. says as follows: "Now, "that being so, what was the course of the other ship? " I have said what it was, and I have found where the collision "took place, and, that being so, I find as a fact that the "*Roanoke* and the *Windsor* were so proceeding that the "*Windsor* had the *Roanoke* on her starboard bow or side, and "that they were proceeding so as to involve risk of collision at "the material time before the collision happened. It follows, "therefore, that I find that they were not overtaken and "overtaking ships. At one moment in a sense they were. "When they passed Dungeness the *Windsor* had passed at "8.15 and the *Roanoke* had passed at 8.35, and if, as I suspect, "what was nearer the truth than as stated by the witnesses "from the *Windsor*, the *Windsor* was very much nearer in "than she says she was to Dungeness at that moment, it may "be then that they were overtaken and overtaking ships; "but that position was discontinued by those on board the "*Windsor*, who deviated from their course and took their ship "into the East Bay and came out again, porting a sufficient "number of points—four, I should think, at least—to bring "her out from the bay until she was heading E.S.E. or S.E."

Against this decision there was no appeal and the case proceeded in the Court of Appeal on the basis that the crossing rule applied. Even so, however, Kennedy L.J. (1) expressed a doubt whether, although the vessels were in crossing positions at the time when the *Roanoke* reduced her speed, *The Banshee* (2) did not compel him to hold that even the crossing rule had not then become applicable. After analysing the decision in *The Banshee* (2) he says: "In the present case, when the "*Roanoke* put her engines to half speed, the *Windsor* was no "less than three-quarters of a mile away on her port side, and "those who were in charge of the *Windsor* could have found "no real difficulty in avoiding the *Roanoke*. According, there-"fore, to the judgment of the Court of Appeal in *The* "*Banshee* (2) the *Roanoke* did not violate art. 21 in slackening "speed, because then no risk of collision between the crossing "steamships was involved. The stopping of the engines three "minutes later might reasonably be regarded only as a further "step in the same gradual process of taking off the way of the "*Roanoke* for the purpose of picking up the pilot."

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(1) [1908] P. 231, 234.

In other words he only declined to follow *The Banshee* (2) and to hold that the crossing rule had not begun to apply at a time when, the ships being on crossing courses but at three-quarters of a mile distance, the *Roanoke* had reduced her speed, because the case has been fought in both Courts on the footing that the crossing rule had then begun to apply. It is quite evident how that experienced judge would have applied, to the facts of this case, the principles which he himself repeatedly laid down.

But to take Mr. Carpmael's next point; on the assumption that I am wrong and the *Manchester Regiment* was the overtaken ship, it is conceded that she failed to keep her course and speed, unless the fact that she was flying the " J.I." signal enables her to say, after the overtaking rule has begun to apply, that in going from " half speed " to " slow speed " and turning 8 points to northward she was " keeping her "course and speed." Mr. Carpmael admitted that he had no authority bearing directly on this result of flying the " J.I." signal, but he said that this case was a perfect analogy to

(1) [1908] P. 231, 245.

(2) 6 Asp. M. L. C. 221.

The Roanoke. (1) Now *The Roanoke* (1) decided, not for the first time, that course and speed in this connection mean course and speed in following the nautical manœuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged. The simplest illustration, perhaps, is that a vessel keeps her course if she follows the proper up-river course on the Thames, notwithstanding that she turns nearly 16 points round the Isle of Dogs (see, for example, *The Taunton* (2) per Scrutton L.J.) ; and it is easy to see the analogy between such a case and that of picking up a pilot at the mouth of a harbour (see *The Albano* (3)) ; nor can it make any difference in principle that in *The Roanoke* (1) itself the area in which the pilot was to be picked up was less defined. Dungeness East Bay was still, to use the words of Lord Alverstone, a known and recognized place for an operation which must be undertaken by vessels in the ordinary course of their navigation ; and it will be observed that throughout the judgments in *The Roanoke* (4) stress is laid on the manœuvre requiring an alteration of course and speed. For example, Kennedy L.J. says : ". . . . if a vessel, in order successfully and in the "ordinary and proper way to perform a proper nautical "manœuvre, *must* alter her speed : " and " the *necessity* of "altering speed which the manœuvre involves " : and again : "as the proper execution of the nautical manœuvre in which "she is obviously and visibly engaged may *dictate*," and lower down on the same page : "where the *exigencies* of the "nautical manœuvre in which she is engaged are visible to "the vessel which is bound under the regulations to keep out "of her way."

But in my opinion it is obvious, and the Elder Brethren so advise me, that the manœuvre of adjusting compasses, even if it is a " nautical manœuvre " within the meaning of that phrase as used in *The Roanoke* (4), does not involve that the vessel need turn at any given moment, or at any given place, or take the cardinal points in any given order : nothing of the sort is required, exacted, dictated or necessitated. At any time

(1) [1908] P. 231.
(2) (1928) 31 Ll. L. R. 119, 120.
(3) [1907] A. C. 193.
(4) [1908] P. 231, 238, 246, 247.

she can stop, reverse, turn away at any speed, or even come about the reverse way to her next heading, or change the order of " the manœuvre " without more than a trifling inconvenience or a momentary interruption of the operations. The compass adjuster said that he was often delayed like that when adjusting compasses. In particular, in this case, the *Manchester Regiment* could have done any of these things when the northerly adjustment was finished, several minutes before the collision. Moreover the argument, pressed to a logical conclusion, defeats itself ; since maintaining a northerly heading for several minutes after that adjustment was finished, instead of turning easterly, would not, according to the argument, be " keeping her course." In my opinion, if I were to hold that the manœuvres convenient for adjusting compasses are in the same category as the recognized nautical manœuvre of picking up a pilot, I should be tearing up the Steering and Sailing Rules without the slightest warrant.

I think that the evidence as to the effect of the " J.I." signal, which it is possible to regard seriously, is all one way, and that it amounts to no more than this, that other ships are usually willing to extend a certain amount of courtesy to a vessel flying the signal, but that it imposes no obligation to do anything but to keep an extra good look-out ; and that, of course, is for the purpose of ascertaining that the courtesy is not being abused so as to incur danger, or, if it is abused, of ensuring that action can be taken promptly by the stand-on ship at the right moment to avoid collision.

This is the highest at which the Elder Brethren, from the point of view of seamanship, regard the obligation upon a vessel which observes another flying the " J.I." signal. With regard to the contention that it imposes any obligation overriding the regulations, they point out that there are several two-flag signals, which are undoubtedly urgent and important, but that none of them have ever been regarded by seamen as imposing any obligation in conflict with the Regulations. On the contrary, seeing that flags may droop in a calm so as to be difficult to decipher and, in any case, are comparatively small, whenever a signal is prescribed which really does impose some obligation on other vessels, such, for example, as the " out of control " signal, the use of " shapes " and not flags is always prescribed.

I must now consider what was happening on the bridge of the *Manchester Regiment*. The pilot was asked in cross-examination whether he was in charge or the master. His answer was that it was never clearly defined ; that he "assumed "charge, put it that way." He added that the pilot is generally in charge of compass adjusting. The master said in cross-examination that the pilot was in charge of the navigation ; that there was no division of opinion on the bridge ; but he admitted later that he always had a responsibility to take over the bridge.

The inference that I draw, having seen and heard these witnesses, is that nobody was definitely in charge of the bridge at all ; but, as the evidence, to some of which I shall have to refer, shows, they were just blundering ahead without paying the slightest attention to a vessel coming at " full speed," at right angles, on their starboard hand. [His Lordship dealt with some of the pilot's evidence, and continued as follows :] The pilot said that the *Clan Mackenzie* was always an overtaker. Asked whether it was for that reason that he thought she would get out of the way, he said, he "hoped," he "thought," he "expected " that she would take some definite action, because she was an overtaker ; but when asked whether the vessels were not on crossing courses he said : "Oh, yes—I agree we were vessels on crossing courses." When asked in those circumstances whose duty it was to keep out of the way, he said : "I have found it customary in these "circumstances for the vessel approaching a vessel adjusting "compasses to get out of the way, but I would have said that "apart from that it was my duty to keep out of the way ; "definitely." He admitted that he did not claim that the *Clan Mackenzie* was an overtaker so as to have the sole responsibility of keeping out of the way. Asked whether she had this responsibility because he was flying the "J.I." signal, he said "Well, yes, it is because of the ' J.I.' signal he ought to keep "out of the way. In the past it has always had that significance." But he added that he did not say that the exhibition of the " J.I." signal entitled him to disobey the

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Steering and Sailing Rules. He said that it was a courtesy which did not entitle him to disobey the rules, and that apart from the " J.I." signal he ought to have acted when the vessels were over a mile apart, and, also apart from the "J.I." signal, there was no obligation on the *Clan Mackenzie* to act until she could see that the collision could not be avoided by the *Manchester Regiment's* action alone. Finally, after saying that the *Clan Mackenzie* was about a quarter of a mile away when he gave the order, he was asked point-blank whether he considered he was the stand-on or the give-way vessel. He said that he only claimed, by displaying these flags, that vessels would take notice of them and take precautions accordingly. He did not claim that he was immune from any action at all. It was because of the way the *Clan Mackenzie* acted in keeping her course and speed that he put his engines "full astern," as the *Clan Mackenzie* could no longer avoid collision by her own action.

The master said that he first became aware of the *Clan Mackenzie* on coming round to the northerly heading for the second time, when she was about two miles away, heading to the west, 6 points on his starboard bow. He said that the *Clan Mackenzie* was about a mile away when the pilot said that he could not turn easterly until she got out of the way. He said: "we had thought she might go astern of us, but seeing "her come on that mile we thought she might go to the northward; she had time to do so." And then he described how the engines were put "astern." He was prepared to say that he thought his ship was stopped in the water or practically stopped. Asked whether the " J.I." signal altered the rules, he said "in Liverpool Bay when a ship is adjusting compasses "all ships keep clear of her. This is practically a rule amongst "all pilots. When you see a man adjusting you get out of "his way." Asked whether flying the "J.I." signal entitled him to disobey the rules he first said that they looked to the *Clan Mackenzie* to clear them when she saw their flag, and then committed himself definitely to the opinion that it did entitle him to disobey the rules. At first he said that he did not think there was any danger of collision when they were a quarter of a mile off, but he qualified this statement later, and admitted that if he was the give-way ship he would have acted at not less than a mile to go under the *Clan Mackenzie's* stern. [His Lordship read further passages from the master's evidence and continued :] It is unnecessary to multiply quotations to show the faulty look-out, indecision or, in the Johnsonian phrase, " stark insensibility " which prevailed on the bridge of the *Manchester Regiment.*

Having shown the destructive effect on Mr. Carpmael's main submission of Mr. Pilcher's cross-examination of the master and pilot, it is only fair to give Mr. Carpmael the full credit of the admissions that he had extracted from the master of the *Clan Mackenzie* on this subject. Having repeated that when he had first seen the *Manchester Regiment* she was, as already stated, heading approximately in the same direction, at two or three miles distance, he said that he " supposed " that at that time he might have been overtaking her. I observe in passing that the rest of his answers follow inevitably from this qualified admission. Having made it, he admitted that in those circumstances it was his duty to keep out of the way ; that he would have kept out of her way if she had kept her course and speed, and that it remained his duty to keep clear until he was clear of her ; that if he had seen the " J.I." signal two or two and a half miles away he would know that she would be likely to alter her heading ; that compasses were generally adjusted clockwise on the cardinal points, and, therefore, if she was on a westerly heading one would expect her probably to go next to the north ; that the only instructions that he gave to the 2nd Officer were to call him when the North-West Buoy was sighted ; that he did not give him any special instructions to keep clear, but relied on his carrying out the regulations. He then admitted categorically that when he left the bridge the circumstances obliged him to keep clear ; that as he left the bridge the *Manchester Regiment* had come 2 or 3 points more to the north ; that it was still his duty to keep clear and he would have gone clear even though she had altered 2 or 3 points ; but that it was still his duty to keep clear even though she altered to a northerly heading to adjust compasses and that he "supposed" that all the time it was his duty to keep out of her way.

Nevertheless both counsel, with these triumphs of the art of cross examination to their respective credits, admitted that the question remained one for the Court, assisted, of course, by the advice of the Elder Brethren: and, to put it quite plainly, I regard the whole of this contention that the *Manchester Regiment* was an overtaken vessel engaged in keeping her course and speed as an after-thought designed to clothe with some pretence of legality an act of negligence of the grossest kind.

Upon the assumption that the overtaking rule applies, but that the *Manchester Regiment* did not keep her course and speed, Mr. Carpmael next maintained that, on the principles laid down in *The Saragossa* (1), the *Clan Mackenzie* was liable for failure to take reasonable care to keep out of his way. I may say at once that, if this were the basis on which the case fell to be decided, both ships would be so grossly negligent in failing to avoid the consequences of each other's obvious negligence for many minutes before the collision that I should not be able to find, and neither counsel has been able to suggest, any intelligent reason for not holding them to blame in equal degrees. On the other hand, if the *Clan Mackenzie* were the overtaker and the *Manchester Regiment* was maintaining her course and speed in spite of the change to a northerly heading, the *Manchester Regiment*, in my opinion, would be to blame as the stand-on vessel, for not acting soon enough when the *Clan Mackenzie* could no longer avoid the collision by her own action alone. As Kennedy L.J. in *The Roanoke* (2) says: "the manœuvring vessel is bound under art. 29 to take all "steps that good seamanship and reasonable carefulness would "dictate promptly to apprise the vessel which has to keep out "of her way of what she is about, and, further even to desist "from the manœuvre if that is obviously necessary in order to "avoid a collision."

In that event her share of blame would be nothing like so heavy, and I should see no reason for awarding her a larger

(1) 7 Asp. M. L. C. 289.

(2) [1908] P. 231, 248.

measure of responsibility than in the converse case with which I have now to deal.

I must now consider what was happening on the bridge of the *Clan Mackenzie* from the time when she passed the Bar light vessel at 2.08. The 4th Officer described how he saw the *Manchester Regiment* about 2 points on his port bow, when she seemed to be heading about north and west and to be stopped. He had his attention drawn to her and to the fact that she was flying the " J.I." signal by the 2nd Officer before he left the bridge. He estimated that she was then two miles off. Then he described how after a while he noticed that the *Manchester Regiment* was under way, that she was getting closer, that she was still bearing on his port bow on the same course, that he knew that it was his duty to stand-on, and did so. He watched her ; she got closer and her bearing remained the same ; that told him that there would be a collision, but he knew that he was stand-on ship and, therefore, his duty was to keep his course and speed. The next thing he knew was that the captain came on to the bridge. Up to then he had not thought it necessary to summon any one to share his responsibility. He thought she was half a mile off when the captain gave the order " hard-a-starboard " and he, in common with the master and the other witnesses for the *Clan Mackenzie*, said that he heard her short blast before the *Manchester Regiment's* three blasts. It is unfortunate that there is this acute conflict of evidence as to the order in which the signals were given between the witnesses from the two ships. In this respect, as I have said, I accept the evidence from the *Manchester Regiment* that her whistle signals were given first. There was only a matter of a few seconds between the two signals, but the significance of the point is that the *Clan Mackenzie's* witnesses were trying to show that they had acted before the *Manchester Regiment* and to support their contention that they had acted in time. The 4th Officer said that when the master came on the bridge he did not think that the time had arrived for the stand-on ship to do anything in order to avoid collision. In cross-examination, after admitting that the constant bearing had indicated danger, that it had shown him that the *Manchester Regiment* was going ahead at a constant speed and slower than the *Clan Mackenzie*, he said that he did not think that a position of danger had actually arisen until she began to get closer; that at what he thought was half a mile he had begun to get anxious and was just going to call the 2nd Officer when the captain came on the bridge. He added that when the captain came on the bridge he acted pretty quickly, and that everything happened very quickly after that and that there was considerable excitement. Finally, for what it is worth, he said, after considerable reflection, that if he had seen her when she was on a westerly heading he would have regarded it as his duty to keep clear, but that nobody told him that she had been heading west.

The master described how he came out of his cabin on the port side of the deck and saw the *Manchester Regiment*, at speed, dangerously close. She was under a quarter of a mile away and at least 3 points on the port bow. By her bow-wave he estimated her speed at five to six knots, as I have already found to be the fact. He described how he rushed up on to the bridge and ordered the wheel hard-a-starboard, rang "stand-by" on the engines and blew one short blast. He said that he did this because he could see by then that the *Manchester Regiment* could not keep out of his way by her own action. She seemed to be heading pretty well at right angles.

Upon this evidence I find as a fact, without any hesitation whatever, that the *Clan Mackenzie*, as stand-on vessel, acted much too late and I reject Mr. Pilcher's contention that, though it was the merest chance which enabled him to do so, the master acted at precisely the right moment. It is quite clear to my mind that the 4th Officer over-estimated, by about double, the distance between the ships at the time when he was beginning to get anxious, and that the master realized, on the instant, that the time for him to take action had already passed, and acted accordingly. Nevertheless Mr. Pilcher submitted that supposing it could be shown, as a matter of calculation, that the *Manchester Regiment* by putting her wheel hard-a-starboard as well as going full astern at the distance of a quarter of a mile could have gone under the *Clan Mackenzie's* stern, then, under the rules, the *Clan Mackenzie* acted in time; and he added, as a corollary to this, that if at the time the *Clan Mackenzie* acted it was even doubtful whether the *Manchester Regiment* by the same combination of action would have gone under her stern, she could not be to blame for deferring action until that moment. But even assuming that it can be proved mathematically that at the exact distance of a quarter of a mile and with one and a half minutes to spare the *Manchester Regiment* by putting the wheel hard-a-starboard as well as as going "full astern" could have gone safely under the *Clan Mackenzie's* stern, which, however, on the advice of the Elder Brethren, I very much doubt, I am satisfied that no seaman, in the actual circumstances prevailing at the moment when action was actually taken, would have been justified in attempting to starboard his wheel, and that no seaman would have been justified in relying on such action being taken. I am advised that it would have been a desperate thing to do, and it is obvious that, unless by some miracle it had the effect of avoiding the collision, any swing of the *Manchester Regiment's* head to starboard would tend proportionately to re-establish the right-angle position, which the action of the *Clan Mackenzie* was calculated to avoid, and so to aggravate the severity of the blow. I am advised by the Elder Brethren, and their advice is in complete accord with my own opinion, that at the time when action was taken by these two ships collision could not be avoided by any action of both combined, and that if any wheel action was to be taken by those on board the *Manchester Regiment* they ought, for what it was worth, to have ported the wheel in order to minimize so far as possible the angle of the blow; but it is only fair to say that in the time available and with the engines going astern, it is improbable that port wheel action would have had much effect, and I am not prepared to attribute any extra measure of blame to the *Manchester Regiment* in respect of her failure to port her wheel at that moment, though I have already expressed my view of her failure to take that, or some other appropriate action, earlier.

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But apart from this I do not think that Mr. Pilcher was propounding the right tests in accordance with established authority. In the well known passage on this point in Lord Buckmaster's opinion in *The Otranto* (1) he says: "The rule "was designed to secure that the stand-on vessel shall maintain "her course until the last safe moment. What that safe "moment is must depend primarily upon the judgment of a "competent sailor, forming his opinion with knowledge of the "necessity of obedience to the rule and in face of all the "existing facts. Subsequent examination may show that his "judgment could not properly have been formed, in which case "the rule has been broken without excuse, but the ultimate "decision is not to be settled merely by exact calculations "made after the event, but by considering these facts as they "presented themselves to a skilled man at the time."

He goes on to refer with approval to a passage from the judgment of Vaughan Williams L.J. in *The Olympic* and *H.M.S. Hawke.* (2) The full meaning of this latter passage is made clearer if one substitutes for the reference to "the exception" the material words themselves from the note to art. 21. The passage will then read as follows: " It seems uncertain on the "cases whether the direction that the stand-on vessel ' also shall " ' take such action as will best aid to avert collision ' only arises "when a collision is inevitable unless averted by the ship "which has to keep her course and speed, or whether the "direction that the stand-on ship ' also shall take such action " ' as will best aid to avert collision ' applies when the collision "is so probable that good seamanship, if there were no rule, "would justify action by the ship bound to keep her course, "to avert collision. I am inclined to think that in a case "where good seamanship would assume that collision cannot "be avoided by the action of the giving-way vessel alone, the "case falls within the direction that the stand-on ship ' also " ' shall take such action as will best aid to avert collision,' "even though in fact the giving-way vessel could by her own "action have averted collision."

It is clear that all reasonable latitude must be allowed to the

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(1) [1931] A. C. 194, 201, 202.

(2) [1913] P. 214, 245.

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man who has to make this difficult decision: see *The Albano* (1) and *The Gulf of Suez* (2); but, as Lord Buckmaster says, if subsequent examination shows that the judgment actually formed could not properly have been formed, the rule has been broken without excuse. In that case the subsequent examination shows that the judgment actually formed, allowing reasonable latitude, was not, in that respect, the "judgment of a "competent sailor." In this case I am satisfied that no seaman really qualified to form a judgment could have decided to act as late as the *Clan Mackenzie* acted; and that her master acted when he did simply because in the circumstances which actually occurred he had no opportunity of judging earlier that the time had come to act, as I have no reason to doubt he would have done had he been on the bridge. The judgment formed by the 4th Officer cannot be held to have been properly formed.

For these reasons I find it impossible to absolve the *Clan Mackenzie* from some share of responsibility for this collision. There is no question in my mind but that the responsibility of the *Manchester Regiment* is much heavier, and I apportion the blame as to four-fifths to the *Manchester Regiment* and one-fifth to the *Clan Mackenzie*, and order that the costs be paid in the same proportions.

Solicitors for the plaintiffs: *Coward, Chance & Co.*

Solicitors for the defendants: *Botterell & Roche, for Vaudrey, Osborne & Mellor, Manchester.*

(1) [1907] A. C. 193. (2) [1921] P. 318, 331.

E. C. M. T.

1938
April 11.

THE INNA.

Shipping—Maritime Liens—Priorities—Damage—Subsequent salvage—Contract to salve for agreed sum—Agreed salvage less than salved value of res.

The lien of subsequent salvors has priority over a damage lien of earlier date.

Where the parties to a salvage agreement have contracted on equal terms, the Court, assuming it has power to do so, will not review the agreement at the instance of interveners who have a lien of earlier date in respect of damage done by the salved ship, merely on the ground that her salved value has turned out to be less than the agreed salvage remuneration which absorbs the whole fund created by the sale of the ship.

Motion for payment out and to determine priorities.

On December 28, 1937, part of the cargo of the Norwegian steamship *Inna* exploded while the ship was in Poole harbour, with the result that the ship sank and warehouses and other property ashore belonging to Southern Roadways (1936), Ld., were damaged.

On January 5, 1938, the Liverpool and Glasgow Salvage Association (hereinafter referred to as the salvors) entered into a contract to salve the *Inna* and tow her to Southampton for the fixed sum of 1250*l.*, and on January 8 the salvage operations were commenced and continued until January 28, by which time the vessel had been raised and towed to Southampton. Meanwhile, on January 26, Southern Roadways (1936), Ld., issued a writ in rem in respect of their damage and on the same day arrested the *Inna* at Poole.

On February 24 the salvors issued their writ in rem. No appearance was entered in either action, and on March 7, on the motion of the salvors, an order was made for the sale of the ship. On March 28 the salvors obtained judgment by default for 1250*l.*, but after deducting various expenses the proceeds of the sale of the ship only amounted to 578*l.*

The salvors moved for payment out of the amount in Court, and Southern Roadways (1936), Ld., intervened on the ground that their claim had priority.

Owen Bateson for the salvors. It is agreed that as the interveners brought the fund into Court by arresting the ship in their action, the costs of the arrest have the first claim on the fund. The salvors, it is submitted, are entitled to the remainder. There is no direct authority on the point, but the general consensus of opinion among text-book writers is that the lien for subsequent salvage takes precedence over the lien for prior damage: see Williams and Bruce's Admiralty Practice, 3rd ed., p. 85; Pritchard's Admiralty Digest, 3rd ed., vol. i., p. 830; Kennedy's Civil Salvage, 3rd ed., p. 8; and Halsbury's Laws of England, vol. 26, p. 672. The principle is that, where services are rendered which preserve the res for all parties, the lien which the performance of the services creates is entitled to priority over any lien attaching before the services were rendered. Though not directly in point, the decisions in *Attorney-General* v. *Norstedt* (1) and *Cargo ex Galam* (2) support that view. The former case is a very strong one, for there the claims of salvors were preferred to the right of the Crown to forfeiture; see also *The Sea Spray* (3), where, however, there was no lien, as the services were rendered under statutory powers, but Bargrave Deane J. said: "The short point upon which my judgment "is based is that, inasmuch as the property was conserved "by the Thames Conservancy, the conservators have a right "in priority to the *Cæsar* [which had an earlier lien in respect "of collision damage] to the proceeds of the vessel when sold." [Reference was also made to *The Veritas*. (4)]

H. G. Willmer for the interveners. There are two questions involved. First, whether the salvors are entitled to the priority they claim, and secondly, if so, whether they are entitled to the whole sum. This is a most unusual case, for the salvage remuneration is largely in excess of the whole value of the res, and the salvors have not "preserved" the fund, for they claim the whole of it. The principle, therefore, that the claims of salvors are preferred because they have preserved the res does not carry them very far.

When the interveners, the plaintiffs in the damage action, arrested the *Inna* in that action, the salvors had not completed their contract. After raising the ship they had to tow her to Southampton and she was arrested at Poole; but for the consent of the interveners the salvors could never have completed the service and earned the right to the 1250*l.* It is inequitable, therefore, that this award should stand.

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(1) (1816) 3 Price, 97, 136.

(2) (1863) Br. & Lush. 167, 181.

(3) [1907] P. 133, 136.

(4) [1901] P. 304.

The general principle is that liens ex delicto take priority over liens ex contractu or quasi-contractu: see *The Veritas* (1); *The Stream Fisher.* (2)

[THE PRESIDENT. Is salvage necessarily quasi-contractual? The defendants may refuse the services and yet have to pay salvage.]

It is the reward for services which the salvors are free to render or not, as they please, whereas persons having a damage lien are unwilling victims, and it is on that ground that liens arising ex delicto are preferred. There is no doubt that the damage lien ranks before the claim of prior salvors: *The Veritas* (1), and also that it has priority over the claim for subsequent wages: *The Linda Flor* (3), *The Elin* (4), although the seamen entitled to those wages may have done work which preserved the res. In the latter case it is true that a subsequent salvage claim was allowed priority, but this was by consent of the other parties, and is not, therefore, an authority against the interveners. If damage has priority over subsequent wages and wages have priority over an earlier salvage claim it is odd if salvage is to be preferred to an earlier damage claim.

[THE PRESIDENT. Wages are not in the same category as salvage; the mariners have to stick to their ship.]

In *The Aline* (5) it was held that damage has priority over a subsequent bottomry bond except in so far as the repairs for which (inter alia) the bottomry bond was given had increased the value of the res, a decision which supports the contention of the interveners.

At the time *Attorney-General* v. *Norstedt* (6) was decided the conception and scope of maritime liens had not been fully developed; it was not until 1851 that the decision in *The Bold Buccleugh* (1) established that damage gave rise to a maritime lien; and there was no question of priorities between maritime lien holders in *Norstedt's* case. (2) The decision in *Cargo ex Galam* (3) is wide of the present point; it merely decided that the possessory lien of the shipowner for freight ranked before the claim of the holder of a respondentia bond.

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(1) [1901] P. 304, 311, 313.

(2) [1927] P. 73, 83.

(3) (1857) Swa. 309.

(4) (1883) 8 P. D. 39.

(5) (1839) 1 W. Rob. 111, 116.

(6) 3 Price, 97.

If, however, the salvors are entitled to priority, they should not be allowed to have the whole fund. An award which absorbs the whole fund is inequitable and should not be allowed to stand. By agreement the salvors are obtaining a much larger sum than the Court would have awarded and, standing in the shoes of the shipowners, the interveners are entitled to ask the Court under R. S. C., Order XIII., r. 10, and Order XXVII., r. 15, to review the judgment by default for 1250*l.* and award such a sum as will at any rate not absorb the whole of the fund in Court.

Bateson in reply. The mere fact that an award turns out to be more than the value of the res is no ground for reviewing the award: *The Georg* (4); and in any event, as interveners, the plaintiffs in the damage action cannot raise the point: see *The Lord Strathcona.* (5)

THE PRESIDENT (SIR BOYD MERRIMAN). This motion raises an interesting point in connection with the priorities as between the salvors of the res, and those who have a claim for damages against the res. On December 28, 1937, some of the cargo of the Norwegian ship, the *Inna*, exploded in Poole harbour, with the result that she was sunk, and damage was done to the property of the plaintiffs, Southern Roadways (1936), Ld. On January 5, 1938, the other claimants, the Liverpool and Glasgow Salvage Association, entered into a contract to salve the ship for the fixed remuneration of 1250*l.*, and on January 8 salvage work

(1) (1851) 7 Moo. P. C. 267.
(2) 3 Price, 97.
(3) Br. & Lush. 167.
(4) [1894] P. 330.
(5) [1925] P. 143.

began, but it was not completed until January 28. Meanwhile, on January 26, after a great deal of the salvage work had been done—the most important part, that of raising the ship from the bottom of Poole harbour—the plaintiffs in the damage action, Southern Roadways (1936), Ld., issued a writ and arrested the ship. The writ in the salvage action was not issued until February 24, and on March 7, on the motion of the salvors, an order was made for sale. On March 28 the salvors obtained judgment by default for 1250*l.*; and they now move the Court to have out the proceeds of the sale.

I now have a rough approximation of the figures before me, which show that, after payment of the Marshal's account and various expenses, the sale may be expected to produce, net, about 578*l.*, which is less than was expected on the appraisement. But even the appraised value itself, as events have turned out, is less than the amount of the salvage contract. I wish, however, to say this about the salvage contract before I go any further. There is not the slightest suggestion that this contract was not perfectly open and above-board in every way. True that it has turned out badly for all parties concerned, other than the salvors, but there is no suggestion that there was any fraud, misrepresentation, or any sort of compulsion which induced the owners to enter into the contract. The ship was lying at the bottom of Poole harbour, and I am told that, after having the opportunity for some eight or nine days of consulting the owners, the master signed this contract on the instructions of the owners or their representatives, without any sort of pressure being brought to bear upon the owners by the salvors. I think it very important to bear that fact in mind, having regard to one of Mr. Willmer's arguments.

In this state of things, where the proceeds of the res in fact are very greatly less than the amount of the salvage claim, and, no doubt, equally are considerably less than the damage claim—at any rate of the damage claim and costs—there arises the question which of these two claimants has priority? It is common ground that it has been assumed for a very long time by text writers and practitioners in Admiralty, that as between claimants for salvage services and those who have a lien for damage, the lien for damage is preferred to prior salvage claimants and is postponed to later salvage claimants. There is ample authority for the proposition that the damage claim is preferred to prior salvage claims, but there is less authority for the other proposition, which is the one I have to decide. Nevertheless, I should feel that I was somewhat bold, having regard to the consensus of professional opinion on this matter, if I were to hold that those who have a lien for damage obtain priority over those who subsequently perform salvage services which preserve the property over which the lien is claimed. I do not think however, that the matter is devoid of authority, as is illustrated by a passage in *Attorney-General* v. *Norstedt* (1): " In the present case, "before they proceeded to this sale, [a public sale under the " order of the Instance Court of Admiralty] there was no "prohibition, and, indeed, no seizure had been then made; "but if the seizure had been made before, it appears to me "it would have been a good ground for their coming and praying "a prohibition, as they did in the case cited, on the footing "of the Crown having a right by forfeiture—a right prior to "that which the other claimants had, and therefore prohibiting "the proceeding there; at the same time it seems to me to "be clear that the salvors, even in that case, would have been "entitled to salvage; and if that were not paid, they would, "of course, have been entitled to a sale, in order to make "good that salvage, for whosesoever property that ship may "be taken to be, still, they who meritoriously preserved it "from destruction, would be entitled to compensation in the "shape of salvage."

I think that that is a very strong case illustrating the great weight to be attached to the claim of salvors. I agree with Mr. Willmer that it does not decide any question of priority as between salvors and those who have a claim for damage, and it may be it does not decide it because, at that time, the existence of a maritime lien for damage was not clearly established. But, at least, it shows the very great claim

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(1) 3 Price, 97, 136.

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which salvors have to priority even against the claim of the Crown, for the Crown's claim was postponed to those who had rendered a meritorious service which had preserved the property from destruction after the other claim had accrued. It is true that that case by no means goes the whole way, and Mr. Willmer is entitled to say that *The Aline* (1) on the other hand shows, in a case where there was no rival claim for salvage, how high the rights of the claimants to priority in respect of a lien for damage are rated. But with those two cases on the one side and the other I think that the other case which is cited in the text-books as authority for the priority of the salvors is important, namely *Cargo ex Galam* (2), a decision of the Privy Council. It is true to say that the actual question of the priority of salvage, as distinct from damage, was not in question. But after discussing the circumstances in which a respondentia bond had been given, Lord Kingsdown, delivering the judgment of the Privy Council, goes on: "The subsequent carrying on of the cargo was "essential to making it available either for the owner of the "respondentia bond, or for anybody else. It was in the "nature of salvage service and in a competition of liens the "shipowner who has rendered a service of this description is "entitled to priority over the holder of a respondentia bond "who has done nothing, and whose money has contributed "nothing towards forwarding the cargo to its destination. "It is upon this sound principle of justice and common sense "that, by the regular practice of the Admiralty Court a prior "bottomry bond is postponed to a subsequent one, and both "to claims of salvage afterwards arising, and that wages "are also entitled to preference. These demands are all for "services rendered to the owner of the bottomry bond, as "well as to other persons interested in the ship and cargo. "We think, therefore, that the claim for freight is entitled "to priority over the respondentia bond."

Now although there was no claim for priority in respect of salvage, it is impossible not to regard that passage as being very high authority for the proposition for which Mr. Bateson has contended. I think really that the truth of the matter is that this is one of the things for which it is difficult to find authority because it has been assumed, I was going to say for generations, that it is the law. It was quite plainly assumed in the case to which Mr. Willmer called my attention, *The Elin* (1), where, on the basis of the authorities which I have quoted, the salvors had been paid by consent before the question of priority between the others was considered. I think that it is also implicit in everything that Gorell Barnes J., as he then was, said in *The Veritas*. (2)

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(1) 1 Wm. Rob. 111, 116.

(2) Br. & Lush. 167, 181.

In these circumstances I think I should be wasting time in analysing the authorities further, and it must be for some other Court to say that the time has come to decide that the maritime lien in respect of damage is to be preferred to a lien for subsequent salvage services which, in fact, alone produce any res at all for the other lien to take effect upon. I therefore have no hesitation in deciding that, on that point, Mr. Bateson is right.

Then there remains Mr. Willmer's second point. He says that that is all very well if, in fact, any res has been preserved for the other lien to take effect upon, but, in this case, no res has been preserved, because the amount of the res is very greatly less than the agreed award for salvage services. He contends, therefore, that I ought to ensure that the whole of the res is not swallowed up by this prior claim for a salvage award and that, standing as the interveners do in the shoes of the owners of the ship, they are entitled to ask me to reopen and review the judgment and to award such an amount to the salvors as will ensure that something is left in the fund to meet the damage claim.

Now I will assume for the purpose of the argument, not merely that I have power, in general, to review a contract for salvage fixing the amount of the award, and also, that I have power under the rules of the Supreme Court to reopen any judgment by default—of both those two things there is no doubt whatever—but also that these interveners are entitled to ask me to reopen this particular judgment. Mr. Bateson has contended, on the authority of *The Lord*

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(1) (1883) 8 P. D. 39 and 129. (2) [1901] P. 304, 413, 315.

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Strathcona (1), that they are not in a position to ask me to do that. I do not propose to decide that point. I propose to assume that I have got the power to do it; but before I could possibly review the judgment, and substitute any other amount for that which has been awarded, it is obvious that I should have to have a great deal more material before me. But I do not think that I need postpone dealing with it on that account. The broad question here raised by Mr. Willmer is simply this: he says, in effect, the matter speaks for itself. It is immaterial how much these people expended, or how much it cost them to perform this service, or whether they are in pocket or out of pocket by reason of it. There is one thing which is decisive in this matter; and that is that the award exceeds the value of the ship, and that, he contends, entitles me, in the circumstances of the case, to substitute some other judgment for that which I have already given.

Now if I thought that that was right I should still have to have more information before I could fix any alternative amount. But, in my opinion, the whole of Mr. Willmer's argument on this point is fundamentally unsound. There is no question whatever that the Court can review agreements and substitute some other sum; and there is no doubt that, among other things which would be taken into account in any such review, would be the value of the property salved. But the Court must act upon some principle in these matters, and I cannot find the slightest authority for the suggestion that the mere fact that the salved value of the ship turns out to be less than the amount of the agreed award is, of itself, any ground whatever for setting aside the agreement and substituting some other sums. In Kennedy's Civil Salvage, 3rd ed., pp. 249, 250, the principles upon which the Court acts are set out. If the agreement is tainted by fraud; if there was any sort of misrepresentation; if the agreement has been cancelled by consent of the parties, there is no doubt about the powers of the Court to act. The only other ground, and the one on which Mr. Willmer relies, is if the terms of the agreement are inequitable. I have looked at the authorities

(1) [1925] P. 142.

which are set out in the books. Mr. Willmer admits that he cannot give me any authority for the proposition that the mere fact that the salved value is less than the agreed remuneration brings the case within the category that the terms of the agreement are inequitable. The class of case relied upon to raise the question of equity seems to me to be entirely different, the class of case where, coupled with the fact that the agreed award is large, there is some element of compulsion, something which shows that the parties were not dealing on equal terms, something of which the remarks of Butt J. in *The Mark Lane* (1) would be true, where he says: "In the cases referred to by counsel, the word 'inequitable' "has been used. But I think that what is at the root of the "question is this—where it is found that a wholly unreasonable "price has been insisted upon by the salvors and an agreement "incorporating it has been signed, the Court looks rather to "the position of the parties than to the reasonableness or "unreasonableness of the amount. Were the parties, in fact, "contracting on equal terms?" That is what is meant by the agreement being inequitable; not that the parties with their eyes open made a bargain which turned out to be unprofitable. The owners here could perfectly well have had an inspection of the state of the ship and have decided before they agreed to the 1250*l.* that it was not worth their while to pay anything like that, and that they would prefer to leave her at the bottom of Poole harbour. Equally the salvors probably took a considerable risk in fixing upon that figure, for the adventure might turn out to be very much more expensive than it did. About that I have no material to go upon. The point is that the parties were on equal terms; there was no question here of any sort of compulsion, or anything to raise any question of equity whatever. In these circumstances, it seems to me that it is quite impossible for Mr. Willmer, even if he is otherwise entitled to do so, to ask me to reopen this agreement and to give judgment for some other sum to be ascertained on principles which have not yet been explained.

(1) (1890) 15 P. D. 135, 137.

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The result will be that the question of priorities will be decided as follows. It is conceded that the damage claimants are entitled to the costs of the arrest. Those costs will come first. Then the salvors will be entitled to their claim for salvage, but I will allow the interveners the costs of their intervention out of the fund in Court.

Solicitors for the salvors: *Pritchard, Sons, Partington & Holland, for Batesons & Co., Liverpool.*

Solicitors for the interveners: *Bennison, Garrett & Co., for Dickinson, Yeatman & Manser, Poole.*

E. C. M. T.

HUSSEIN OTHERWISE BLITZ *v.* HUSSEIN.

1938
March 21.

Nullity of marriage—Jurisdiction—De facto husband's foreign domicil —Duress—Threats.

Where a woman petitioned for nullity of marriage on the ground of duress and her de facto husband was domiciled at the time of the institution of the suit in Egypt, the Court exercised jurisdiction and held that the petitioner was constrained through fear, caused by the man's threats, to go through the ceremony.

WOMAN'S PETITION for nullity of marriage on the ground of duress.

The ceremony of marriage was performed on October 10, 1933, at the register office, Brentford, the petitioner, Mrs. Estella Henrietta Hussein, née Blitz, being then aged eighteen years. It was alleged in the petition that Mrs. Hussein never cohabited with the respondent, Mr. Mohamed Hussein, and the marriage was never consummated; that the petitioner was domiciled in England and the respondent in Egypt, where he was employed as a railway official; that the petitioner was induced to be a party to the ceremony of marriage not of her own free will, but through fear, duress and terror of the respondent; and that for some time before the ceremony the respondent continually threatened to kill her if she did not marry him and she believed that he would carry out his threats.

Before the ceremony the respondent prevailed upon the petitioner to sign the following document:—

"I undersigned Estella agree to marry Mohamed on the "following conditions: (1.) I know well that he is an old-"fashioned Egyptian and I know all about the Egyptian "habits and character and I promise to follow all these habits "and character without any exceptions; (2.) I promise not "to go out anywhere without my husband; (3.) I will never "have men or boy friends of me nor ask any man or boy to "visit me at home nor see any man or boy outside or have "any appointments; (4.) I promise not to write to anybody "friend of mine in Egypt or anywhere else abroad, man, boy, "girl or lady; (5.) I promise not to dance with any man or "boy at home or at any other home or at any dancing hall "in any feast or in any other circumstance; (6.) I know "well that Mohamed is not rich at all and he can't promise "anything except just keeping me comfortably; (7.) I confess "that I write these conditions with my own wish and without "any obligation from any side, and that I am conscious and "responsible, and if I break any of these conditions I have "to separate, and have no right to claim any penny from "Mohamed at any Court, whether Egyptian or English."

R. F. Bayford K.C. and *Elliot Gorst* for the petitioner. The Court has jurisdiction to entertain the suit notwithstanding that the de facto husband is domiciled abroad: Dicey's Conflict of Laws (5th ed., r. 65 (I.), p. 294), and Halsbury's Laws of England (Hailsham ed., vol. 6, p. 303). On the question of duress invalidating marriage *Scott, falsely called Sebright* v. *Sebright* (1), is a case in point.

HENN COLLINS J. I am satisfied that I have jurisdiction to entertain the suit, and grant a decree nisi of nullity. The petitioner's story is an amazing one; but I accept it. In ninety-nine cases out of a hundred it would be almost impossible to accept such a story, but her evidence is corroborated in material respects. I think that the respondent's conduct clearly amounts to threats. I am guided by the words of Butt J. in *Scott* v. *Sebright* (2): "It has some-"times been said that in order to avoid a contract entered into "through fear, the fear must be such as would impel a person "of ordinary courage and resolution to yield to it. I do "not think that it is an accurate statement of the law. "Whenever from natural weakness of intellect or from fear "—whether reasonably entertained or not—either party is "actually in a state of mental incompetence to resist pressure "improperly brought to bear, there is no more consent than "in the case of a person of stronger intellect and more robust "courage yielding to a more serious danger."

(1) (1886) 12 P. D. 21.

(2) Ibid. 24.

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HUSSEIN OTHERWISE BLITZ *v.* HUSSEIN.

I believe the petitioner's evidence and I accept her evidence that she believed in the respondent's threats. It is obvious from the document which she was made to sign that he was avid of power over this girl of eighteen. He dominated her by fear and exercised the power which he had over her to coerce her into marriage.

Decree Nisi.

Solicitors: *Canter, Hellyar & Co.*

W. L.

1938
March 31 ;
April 5.

THOMPSON OTHERWISE HULTON *v.* THOMPSON (CAUSTON INTERVENING).

(KING'S PROCTOR SHOWING CAUSE.)

Divorce—Wife's petition—Husband's alleged adultery—Decree nisi—King's Proctor's intervention—Named woman's certificates of virginity—Burden of proof—Fresh evidence—Costs of intervention—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 182.

In granting a decree nisi of divorce on a wife's petition, to which the defence had been abandoned, the Court sent the papers to the King's Proctor to inquire into the circumstances of two medical certificates of virginity obtained by the alleged adulteress. The King's Proctor intervened, alleging that the respondent and the alleged adulteress had not committed adultery, and that the latter was virgo intacta :—

Held, after fresh evidence, that the fact of the certificates of virginity, though not conclusive on the issue of adultery, made the burden of proof very considerably heavier on the petitioner. In spite of the strong presumption in favour of the alleged adulteress, it was found that she and the respondent had had mutual intercourse amounting in law to adultery. Inasmuch as there would be more hardship in putting the whole of the expense of the intervention on the petitioner than the King's Proctor, the latter was ordered to pay three-quarters of the petitioner's costs of the intervention.

WIFE'S PETITION for dissolution of marriage. King's Proctor's intervention after decree nisi.

In her petition, presented in October, 1936, Mrs. Florence Elizabeth Millicent Thompson, formerly Lady Hulton, of Upper Brook Street, W., alleged that her husband, Major John Henry Thompson, a retired Army officer, had committed adultery with Miss Margaret Causton in the autumn of 1936 at Old Well Cottage, Peppard, near Henley, and later at the latter's flat at Cumberland Mansions, Marylebone. The petitioner prayed for the dissolution of her marriage. By their answers the respondent and Miss Causton, who intervened, denied the charges, but the suit was in fact undefended.

LANGTON J. granted the petitioner a decree nisi on July 9, 1937, and he sent the papers to the King's Proctor for inquiry in view of a statement made by counsel for the petitioner that

Miss Causton had obtained medical certificates that she was virgo intacta.

On January 4, 1938, the King's Proctor filed a plea alleging that the respondent and Miss Causton had not committed adultery and that at all material times she was virgo intacta. The petitioner joined issue.

The Solicitor-General (*Sir Terence O'Connor K.C.*) and *H. W. Barnard* for the King's Proctor.

Roland Oliver K.C. and *Bush James* for the petitioner.

LANGTON J. admitted fresh evidence with regard to the charges in the pleadings. The facts and arguments were fully reviewed in the judgment.

Cur. adv. vult.

1938. April 5. LANGTON J. This has proved a difficult, anxious and most distasteful inquiry. Evidence was given at the hearing by two domestic servants, working in a house at Peppard, near Henley-on-Thames, proving that Major Thompson and Miss Causton had stayed together at this house and together occupied the same bedroom. This evidence was supplemented by evidence from two hall-porters from Cumberland Mansions proving further association between Major Thompson and Miss Causton at the latter's London address. Major Thompson had appeared and put in an answer to the petition, and Miss Causton had intervened and also had put in an answer. On May 28, 1937, the solicitor representing the respondent and the intervener wrote to the petitioner's solicitors saying that his clients did not intend to defend the suit any further. The case accordingly came before me as an undefended suit, and upon the evidence which I have recapitulated above I granted the petitioner a decree nisi.

At the conclusion of the evidence I adverted to a matter which Mr. Roland Oliver, for the petitioner, had very properly brought to my notice. In December, 1936, the month in which Major Thompson and Miss Causton had filed their

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THOMPSON OTHERWISE HULTON *v.* THOMPSON.

Langton J.

answers in the suit, the solicitor acting for Miss Causton had sent to the petitioner's solicitors copies of two certificates which purported to have been obtained from two eminent gynæcologists, namely, Dr. A. Galletly, of Harley Street, and Mr. Everard Williams, of Wimpole Street, to the effect that they had separately and on different days examined Miss Margaret Causton and found that her hymen was intact. In answer to this communication the petitioner's solicitors made the not unnatural suggestion that Miss Causton should submit herself to an examination by a doctor whom they thereupon named. Miss Causton immediately refused to submit to any further examination, and the case proceeded as a defended case without further reference to this somewhat startling assertion on her part until the moment when her solicitor acquainted the petitioner's solicitors in May, 1937, with the fact that the suit would no longer be defended.

Accordingly, at the same time that I granted Lady Hulton her decree, I directed that the papers should be sent to the King's Proctor to enable him to inquire into the case, with the special object of discovering what were the true facts concerning Miss Causton's alleged visits to the two doctors whom she had named. I am happy to see from the transcript of the notes of the proceedings that in taking this action I made it clear that I intended to make no reflection upon the bona fides of the petitioner. The inquiries made by the King's Proctor in pursuance of my direction have presented me with more than one awkward problem for solution, but it is due to the petitioner at the outset to say that none of the difficulties that have arisen are in any way due to fault on her part, or to any mistake or omission on the part of her advisers.

On March 4 last the Solicitor-General and Mr. Barnard, appearing on behalf of the King's Proctor, presented a plea alleging: (1.) that the decree nisi which I had granted had been obtained contrary to the justice of the case; (2.) that the respondent had not committed adultery with the intervener; and (3) that the intervener was at all material times a virgin. The petitioner, represented by Mr. Roland Oliver and

Mr. Bush James, appeared to contest this plea, having put in an answer thereto which in effect raised two substantial issues: (1.) Whether Miss Margaret Causton was or was not a virgo intacta; (2.) whether adultery had been committed by Major Thompson and Miss Causton.

It became a matter of argument during the proceedings as to how far the petitioner should be allowed to go in the way of adducing fresh evidence of adultery between the parties. In an earlier case (1) heard this term upon a plea raised by the King's Proctor, I refused to hear any fresh evidence at all on behalf of the petitioner upon the consideration of the King's Proctor's plea. I pointed out that it was necessary to remember that the hearing of such a plea was neither an appeal from the original hearing, nor a rehearing, nor a new trial of the case. In that case, however, the fresh evidence which it was sought to adduce raised matter which was both outside the issues raised on the King's Proctor's plea, and outside the scope of the original petition. When once the plea was established, the case for the decree which had been granted disappeared, and although, since there was no fault upon the part of the petitioner, it was unnecessary to dismiss her petition and thus prevent it from being reconstituted, it was clear that I could not proceed any further at that moment with a petition which had become manifestly incomplete.

In the present instance the fresh evidence which has been offered is both relevant to the issues raised on the King's Proctor's plea, and within the scope of the original petition; being, in fact, an amplification of the evidence already adduced. I ruled, therefore, that the petitioner could call fresh evidence to counter the plea of the King's Proctor so long as that evidence could properly be offered upon the facts raised in the petition. I intended by this ruling to give to the petitioner the full latitude to which I think she is entitled in order to support her decree. At the same time I aimed at ensuring that no injustice should be done to Miss Causton or to Major Thompson by allowing any fresh matter, to which they had not pleaded, and to which they might have desired to make answer, to be alleged against them.

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(1) *Oldschool* v. *Oldschool* (*King's Proctor showing cause*) The Times, March 17, 1938.

Turning to the first issue between the parties, the two gynæcologists who had given certificates to Miss Causton were called before me. They agreed in averring that the lady's hymen was intact, but they did not agree upon very much else concerning her. Whereas Dr. Galletly said that the hymen he examined was more elastic than inelastic, Dr. Williams spoke of tension in the hymen and appeared to consider that it was markedly inelastic. The certificates themselves are both confined to a bare statement that the hymen was intact. The principal controversy upon this first issue turned upon the identification of Miss Causton as the lady who, in fact, was examined by these doctors in November and December, 1936. Dr. Williams was frankly unable to identify the lady at all, though he spoke to her having apparently recognized various objects in his consulting room when she was brought there by a representative of the King's Proctor's Department after the hearing of the petition. Dr. Galletly was able to go a great deal further, and was ready to state that having seen the young woman again, and conversed with her, he had no reason to doubt that she was the lady who had presented herself for examination. But he too fell short of complete identification, and was unable to swear positively that she was the lady in question.

I have accordingly been left in some doubt by the only evidence which could have established this part of the issue conclusively in favour of Miss Causton. I have been obliged to weigh the probabilities and to consider with great care the evidence of Miss Causton herself upon this subject. I have been very reluctantly obliged to discard and to discount a good deal of her evidence upon other matters, but I find it very difficult to imagine that she can have arranged a personation so complete and so daring before consulting her solicitor. It appears to me most unlikely that she could, before getting legal advice, know with any exactitude how long was likely to elapse between the initiation and the hearing of the suit, and she could not therefore know how long might elapse between the doctors' examination and the time when the matter might be put to the test in open Court. It is true that she herself was under the impression that the certificates would be accepted without the doctors being called in evidence to support them, but although I have come to the conclusion that Miss Causton is not above distorting the truth to suit her purposes in moments of stress, it is quite another thing to suppose her capable of a deliberate, cold-blooded and daring form of fraud.

On the other hand, the explanation offered by Major Thompson and Miss Causton of their strange conduct in first putting forward these certificates and then withdrawing their defence is involved, unlikely and unconvincing. As Mr. Oliver attractively put it, it is far easier to suppose that the certificates were put forward as a bold piece of bluff in the hope that the petitioner would thereupon drop her petition, and that when the bluff was called the defenders realized that their position was hopeless. Whilst on any view some doubts must necessarily remain, I think that the balance falls in favour of Miss Causton and that I must find that she is the lady who was examined by Doctors Galletly and Williams and certified by them to have the hymen intact.

This brings me to a consideration of the second issue under circumstances of most unusual difficulty. Mr. Oliver conceded, as he was bound to do, that Miss Causton's condition, although not conclusive upon the question of adultery, made the burden very considerably heavier upon his client. The full strength of the petitioner's case upon this second issue was then developed before me, and proved to be a very different matter from the evidence which had been called in the first instance. Taking first the evidence as to the stay of Miss Causton and Major Thompson at Peppard, the evidence of Miss Betty Finnigan, a young woman who lived in the neighbourhood, and was employed by Mrs. Circuitt, the lessee of the house, from ten to one in the morning, was particularly impressive. This witness struck me as coming from the best class of country domestics, and her evidence was completely free from any form of malice, pruriency or gossip. She stated the facts as she evidently knew them, shortly, clearly and convincingly, and I had no doubt at all that she was telling me without fear or favour what she knew to be true. She demolished almost in a sentence the elaborate evidence given by Miss Causton as to sleeping alone in the small room at the far end of the first floor of the cottage. It was Miss Finnigan's duty to make the beds. She saw the personal night attire of the various parties who slept in those beds, and she had no doubt, and I have no doubt after hearing her, that Miss Causton and Major Thompson slept together in twin beds in the large middle room on the first floor of Mrs. Circuitt's cottage.

I have not forgotten the fact that neither this witness nor the other witnesses who gave evidence on behalf of the petitioner, were or could be thoroughly cross-examined. As the Solicitor-General very properly pointed out, it was no part of his duty as appearing on behalf of the King's Proctor, upon my original direction, to appear to take sides either for or against the petitioner. At my invitation and in order to assist me, he put in each case a few questions to the witnesses on behalf of the petitioner, for the purpose of sifting their evidence. Miss Finnigan not only emerged quite successfully from this brief test, but I am satisfied that her testimony would have withstood the most searching scrutiny with equal credit.

The evidence concerning the association of Major Thompson and Miss Causton in London at her flat in Cumberland Mansions is far more varied, and by no means so clear or so convincing. It consisted in the main of testimony from a hired outside domestic, Miss Dorothy Allen, and that of her mother Mrs. Allen, who came to do her daughter's work at times when her daughter was incapacitated. Both Miss Allen and her mother were so impressed by what they saw that neither had any doubts as to the fact that Major Thompson and Miss Causton were a married couple. Again there was a complete absence of any malice or hostility to the respondent or to Miss Causton on the part of these servants. Indeed Mrs. Allen added one of the few touches of humour which relieved these rather melancholy proceedings by declaring with unconscious irony that the parties had struck her as a sensible decent couple.

Greatly, I am sure, to her own regret, Mrs. Allen removed the last shred of confidence which I felt in Miss Causton's reliability by a reluctant admission that Miss Causton had greeted her in one of the luncheon intervals of this trial with the question: "You haven't given me away, have you?" Miss Causton having been taxed with this tell-tale expression "given me away," after her return from the interval, denied categorically upon oath that she had ever used this expression. I think that no one who heard Mrs. Allen sadly and very reluctantly admit that the expression had been used, could for one instant have doubted that the old lady was telling the truth. The evidence of these two domestics went to show that Major Thompson had in reality used this flat both in the absence of and in the presence of Miss Causton over many weeks. The evidence of the Allens was supplemented by that of private inquiry agents and hall-porters, which strengthened considerably the very clear impression I had received that Major Thompson was at least a frequent lodger if not an habitual resident at Miss Causton's flat.

Against this strong evidence for the petitioner I have to weigh, first, the condition of Miss Causton, and secondly, the sworn evidence of herself and Major Thompson. These two matters fall properly together for joint consideration. As was pointed out by Hill J. in *Chalmers* v. *Chalmers* (*Threlfall intervening*). *King's Proctor showing cause* (1), proof that the hymen of the woman accused of adultery is intact, though not absolutely conclusive, puts a very heavy burden upon the party claiming that such a woman has committed adultery. Moreover in the present case I have never lost sight of the fact that neither Miss Causton nor Major Thompson have been represented in these proceedings, and it is accordingly my duty to be specially careful in making inferences against them. On the other hand, no one nowadays contends that the fact that a woman accused of adultery is found to be virgo intacta is inconsistent with partial intercourse sufficient to sustain the charge of adultery. The finding of Hill J. in *Jolly* v. *Jolly and Fryer* (1) is an instance in point, and shows that this most careful and discriminating judge was ready to find what he has so properly described as a " very heavy burden " discharged, where the circumstances disclosed by the evidence warranted such a conclusion. Similarly the decision of Coleridge J. in *Harry* v. *Harry* (2), shows that a medical certificate of this character is in no way conclusive. In the case of *Rutherford* v. *Richardson* (3) Lord Birkenhead uses language which is apposite to the present case: "The evidence "of the doctor was cautious and guarded. It seems, however, "to establish that there had been no penetration and, in the "doctor's opinion, that the appearance of the organs was "such as he did not think was consistent with an effective "attempt at penetration. Some suggestion was made in "argument in this House that this condition, even though "inconsistent with penetration, was not inconsistent with "some lesser act of sexual gratification. If there were evidence "of such an act, it cannot be doubted that, whatever view "may have been taken in past ages in the Ecclesiastical "Courts, a decree based upon adultery might issue."

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(1) (1930) 46 Times L. R. 269, 270.

In the present case I have had useful evidence from Dr. Beckett Overy, a well-known gynæcologist, upon the general question of the various forms of sexual gratification which might be obtained without rupturing the hymen, but Dr. Beckett Overy had not seen or examined Miss Causton. This evidence is consistent of course with the cases I have referred to above. But when this evidence and all these cases are weighed and considered, the burden remains, and the Court should be slow to make an adverse inference against a lady so strongly protected. In such circumstances I have felt that I could be satisfied with quite a small measure of reliance upon the evidence of Major Thompson and Miss Causton to support their sworn denial. Unfortunately, however, I have been able to place no reliance at all upon Major Thompson, and very little indeed upon Miss Causton where matters of prime

(1) (1919) 63 Sol. Jo. 777.

(2) (1919) The Times, April 4, 5.

(3) [1923] A. C. 1, 11.

importance are concerned. Major Thompson was in no way an impressive witness. His mode of life is aimless and vague, and his means of existence entirely precarious. As I understood it, since he separated from his wife he has had no fixed abode and no certain means of livelihood. He admitted that he had spent a certain portion of the present winter at Cannes upon the proceeds of a pledge or sale of some shirt studs, and I gather that his fortunes depend largely, if not entirely, upon the fluctuating chances of the turf.

} Euphemism!

Major Thompson gave evidence in a somewhat hesitating manner, but he asked me to remember, and I have not forgotten, that he had been a victim some years ago of a serious sporting accident, which he claimed had impaired his powers of memory and concentration. I can well believe and am ready to credit that the effects of an accident of this kind might go far to explain the astonishing vagueness which he exhibited concerning his place of abode during the crucial period, but I am afraid that no degree of charitable leniency would allow me to explain his contradiction of Miss Finnigan's positive evidence that Miss Causton and himself slept in the same room at Peppard, upon the hypothesis of a lapse of memory.

Again, Major Thompson was in the direst trouble when he sought to explain how he came to write the remarkable letter to his wife of May 27, 1937, in which he acquainted her with his intention not to defend her divorce petition. Judged by all or any of the many explanations and mixed motives which he put forward to justify this extraordinary epistle, it remains at the best a monument of hypocrisy, since it claims to be dictated entirely by friendly good feeling for his wife, whereas in all of the explanations which he has given that laudable motive was conspicuously absent. In the end Major Thompson accepted from me that the letter was inspired by the following motives: First, that he had no money to defend the proceedings; secondly, that he wanted to keep Miss Causton's name out of the proceedings; thirdly, that he thought that an undefended case would provide the least publicity; and fourthly, that he thought the letter provided a graceful way out of a difficult situation. It is possible to believe all or any one of these motives as the mainspring of the letter, but when one remembers that he had before writing the letter, and before seeing his wife as he describes in the letter, already determined to abandon his defence and so instructed his solicitor, the letter cannot stand as any high testimony of the honesty or sincerity of the writer. It is, I am afraid, abundantly clear that Major Thompson is a person upon whom, so far as this case is concerned, I can place no reliance at all.

It is not much better when one turns from Major Thompson to Miss Causton. This young lady is apparently in steady employment, and industrious and efficient at her work. Up to a point she gave her evidence well, and her behaviour in Court was above reproach. In the course of a lengthy and damaging cross-examination she never lost her temper, or raised her voice, or behaved otherwise than with exemplary propriety. Most unluckily, however, she was confronted with her tell-tale mistake in the corridor, and I am sadly afraid that with the best will in the world to find one, there is no other possible explanation of that incident than a categorical falsehood on the part of Miss Causton. Her elaborate explanations of her conduct at Peppard and in Cumberland Mansions are utterly destroyed by the evidence of Miss Finnigan and the Allens. She gave no kind of reason why Major Thompson, who was not related to her, and had no business ties or acquaintance with her, should have been at all material times and indeed down to the present day in possession of a latch-key to her flat. I find myself driven to the conclusion that the explanation of the sad fact that this young lady has been compelled to deviate so largely from the truth, can only be found in the necessity which she has experienced of endeavouring to gloss over and put some kind of decent face upon her obviously suspect and extraordinary association with Major Thompson.

There remains the final question of how far this long-continued association in circumstances of such a highly compromising character, rendered doubly suspicious by the ineffectual denials of the parties, should weigh in the balance against the medical certificates, guarded but precise, of Doctors Galletly and Williams. I have deliberated long and carefully upon this subject, and in spite of the strong presumption in her favour, I cannot escape the inference which arises from the fact that Major Thompson and Miss Causton, who are admittedly on terms of deep affection, have certainly slept together in the same room at Peppard, and almost certainly slept together in the same bed in London, and have been at great pains to deceive both the world and this Court in the matter of their behaviour. I am regretfully forced to the conclusion that the respondent and the intervener in this case have had mutual intercourse amounting to adultery in law.

I must accordingly find in favour of the petitioner upon the second issue, and although the King's Proctor's intervention is abundantly justified by his success upon the first issue, the decree granted by this Court July 9th, 1937, will stand.

Then ensued a discussion as to costs, on which Langton J. reserved judgment.

1938. April 5. LANGTON J., giving judgment on the question of costs, referred to s. 182, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, enabling the King's Proctor to charge costs not allowed to him on an intervention as expenses of his office. He said that *Higgins* v. *The King's Proctor* (1) clearly established that the King's Proctor was on the same footing as an ordinary litigant, but he ought to have the advantages as well as the disadvantages of that position. There was, in his Lordship's view, more hardship in putting the whole of the expense of the intervention on the petitioner than on the King's Proctor. Without in any way suggesting that the King's Proctor had done anything except his duty—and he had done it at his (the judge's) instigation and suggestion—he thought that the justice of the case would be met if the King's Proctor paid three-quarters of the petitioner's taxed costs of the intervention.

Solicitors: *The King's Proctor; Withers & Co.*

W. L.

(1) [1910] P. 151.

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Applied. GORST *v.* GORST [1952] P. 94

Divorce—Connivance—Husband's petition—Knowledge of wife's adultery—Toleration—Intention—Burden of proof—Petition dismissed—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 4.

In a husband's contested divorce suit on the ground of his wife's adultery it was established to the Court's satisfaction that the wife committed adultery with two men to the husband's knowledge; that the petitioner condoned it; that in September, 1935, the petitioner became aware of his wife's adulterous association with a third man, the co-respondent, and that his wife refused his repeated requests to give up the co-respondent, but husband and wife had intercourse on several occasions thereafter until in June, 1936, he decided to take divorce proceedings, having made up his mind that his wife preferred the co-respondent to himself:—

Held, a man might not stand by and tolerate his wife's adultery, meeting her, conversing with her, and having intercourse with her, and then, because in the end he conceived that when her affections had passed from him he was entitled to a divorce, seek a remedy at the hands of the Court. The petitioner's conduct fell within Lord Westbury's definition of connivance in *Gipps* v. *Gipps and Hume* (1864) 11 H. L. C. 1.

Whereas before the Matrimonial Causes Act, 1937, became law, the burden of proof of connivance alleged by a respondent lay upon that respondent, now, where the circumstances of the case suggest connivance, the burden is upon the petitioner to satisfy the Court that connivance did not exist.

HUSBAND'S SUIT for dissolution of marriage.

Mr. Horace Sullivan Digby Lloyd, the petitioner, sought the dissolution of his marriage, celebrated in July, 1928, with Mrs. Vera Adeline Lloyd, on the ground of her adultery with Mr. Peter Leggeri, the co-respondent. By her answer the respondent wife alleged that the petitioner had conduced to and connived at her adultery. The co-respondent by his answer denied the charges. By his reply the petitioner denied the charges of conduct conducing and connivance at adultery.

The following statement of facts is extracted from the judgment: At the time of the marriage in 1928 the husband was already a divorced man, and the wife, who gave her age at the time as thirty-four, was a widow who, on her own statement, had already been living with two men as their mistress. The parties met when the husband was married to his first wife in India in 1921, and the respondent at that time, to use her own expression, had been the acknowledged mistress of a man named Wheeler. The husband said that he did not know that she was at that time the mistress of Wheeler. When they married in 1928 the wife was, according to her statement, the mistress of a man referred to throughout as Ben, a solicitor, now dead. After marriage the parties returned to India, and later the wife committed adultery with a man named Kazi, and her husband knew of that fact afterwards. On the return voyage from India, when the husband was much incapacitated by illness, another man of the name of Martelli paid very insistent court to the respondent, and committed adultery with her, and, at least after the adultery, her husband knew of it. The wife returned to England about the year 1932. The husband, realizing that he had got his wife, to whom he was quite devotedly attached, away from these people and away from the evil influences of India and the East, hoped that things would be better between them, and that this would be the end of her infidelity.

On the wife's return to England the husband secured a release from his employment in India and compounded his rights for some 2000*l*. He invested it first of all in an hotel in the neighbourhood of Maidenhead, and afterwards in a commercial adventure. Both those adventures came sadly to grief, and before very long the husband found himself in the direst financial straits. His wife was a woman of great energy, and sought employment rather than share the very small wage which her husband found was the limit he could at that time command. The co-respondent, Mr. Leggeri, a business man, and the respondent were brought together by means of an advertisement for a housekeeper, and the respondent went to Hill House, Wereham, Kings Lynn, Norfolk, in the middle of 1935 as housekeeper to Mr. Leggeri. Mr. Leggeri, who elected not to go into the witness-box, if not a bachelor, was a man living alone, and from shortly after July, 1935, until October, 1936, she lived there as

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Mr. Leggeri's mistress. By the middle of September, 1935, that relationship was established to the knowledge of the petitioner. The latter was earning the meagre wage of 3*l.* 10*s.* a week. When he became aware of the relationship he begged the respondent to give up her association with Mr. Leggeri. She refused. She came to town every two months, and she and her husband resumed their relations and had the ordinary intercourse of married people while spending week-ends together. Finally in June, 1936, he determined to bring divorce proceedings against his wife, naming Mr. Leggeri as co-respondent.

J. J. Davies for the petitioner.

J. E. N. Russell (with him *H. B. D. Grazebrook*) for the respondent.

Acton Pile for the co-respondent.

Langton J. [in giving judgment, said :] The views which the petitioner and the respondent both openly express upon subjects of private morality are so lax that I both hope and believe they do not represent the views of any large portion of the community. The petitioner struck me as a completely honest individual, and the wife painted her character a little blacker than was necessary, and her husband's view of her actions as more lax, more deplorable than was the truth.

She says (I do not accept her evidence in this respect) that her husband knew quite well she was the mistress of "Ben," knew that she intended to continue to be the mistress of "Ben," and knew that at the time when she married him she was actually contemplating further association with "Ben." If I believe that, of course, there would be no more difficulty in this case. One would have no difficulty at all in a case in which a husband was so complacent as to agree to share his wife with a man who had already enjoyed her in the capacity of a mistress. Such a man could not possibly come to this Court with any hope of redress on the grounds of her adultery, to which he had openly and freely assented.

Having seen the petitioner, having heard him cross-examined at great length, I do not believe that story at all. I think that is one of the instances in which the wife, for her special purposes here, has distorted the true facts, making her husband appear worse than he really is.

The respondent says that she told her husband at least of the fact that Martelli was proposing adultery to her, and that her husband made no objection. Again I do not believe her. I think she is distorting that incident, and that what really happened was, as in the case of Kazi, that the husband only knew afterwards. I accept the petitioner's version about the whole of that earlier life. It was all exceedingly regrettable. People made of sterner stuff, people taking a stronger view of morality, might have acted differently. But up to that point I accept his version of the matters in the East, and there is nothing in his version as I understand it that could militate against the relief he now seeks.

He says that the view he formed of her was that she was over-sexed, that the atmosphere of a hot country or any sojourn in hot weather contributed very largely to the regrettable actions of which she acknowledged she was guilty. He felt, as it seems to me, a reasonable hope that with the return to England and increasing age (the lady by 1932 was approaching forty years of age) and with increasing consortium with himself, he might count upon a better relationship and count upon a faithful wife.

The degree of care which a man might be called upon to exercise in regard to a wife who had a blameless past is, of course, quite different from the degree of care which one would expect him to exercise in respect of a lady of such known proclivities as this lady unfortunately turned out to be. All that background has to be kept firmly in view in weighing and judging the position on the final incident. When the petitioner became aware that his wife had in turn become the mistress of Mr. Leggeri and that she proposed to continue in Mr. Leggeri's service and in that capacity, his attitude was, judged by any standard, a very remarkable one. No one can blame his wife that she should have struck out for herself and left her husband, and should have endeavoured to supplement his small income; but when the husband became apprised of the fact that the way she had chosen to do it was by becoming another man's mistress, one would have imagined that by any standard of morality the position called for urgent and drastic action. Mr. Lloyd, however, took no such action.

In June, 1936, he says (and I believe him) that he was still trying to persuade her to come back, and he used the expression "I hoped until the last." In another portion of his evidence he said "I kept on suggesting to her to come back," but further than this suggestion Mr. Lloyd never seems to have gone.

[His Lordship proceeded to deal with the wife's allegation that her husband had fallen so low as to be willing to seek a job in the employment of Mr. Leggeri, and said that in giving his wife a detailed statement of his business experience and capabilities he did so in the hope that she would meet some one who would give him the necessary promotion. Langton J. continued:] I think it is only fair and due to him to say that he disliked the position in which he found himself intensely, and that he endured it not from any wish or desire for it, not in the hope of any gain or reward therefrom, but because his wife was a strong, determined, very self-willed person. He had either to take the final step of threatening divorce, or endure it, as he elected to do. I put it to him myself, putting it at the best, that he was not unwilling to profit to the extent of getting better employment through the agency of his wife and her acquaintances, the men who were the friends of Leggeri; and he said with his usual candour that he could not escape from that. Again, the petitioner does not appear here in a very favourable light.

Does what the petitioner did amount to connivance in law, or not? Now the determination of this strange relationship between the respondent and Mr. Leggeri has a bearing upon the case. In the middle of June, 1936, the petitioner and his wife, who had been proceeding during the nine months immediately before that upon terms of great amity and affection, as, indeed, their letters show, had a very serious disagreement. At first sight the cause of the disagreement seems almost ridiculous. The respondent had arranged with Mr. Leggeri to take a bungalow at some seaside resort for the month of August, and plans were going forward for the occupation of this bungalow. The respondent was to entertain her husband at the bungalow during a certain specified period when he could get leave, which included the August Bank Holiday, but Mr. Leggeri, for a reason, I think, connected with some pet animals, insisted that that period should be reserved for him. When the petitioner became aware of the fact that his wife was going to prefer Mr. Leggeri's company to his over the very period for which he had been invited, he seems to have taken a very serious view of that preference.

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It emerged during the discussion of this matter that the petitioner's real view of the whole of these matters was that greatly as he disliked the position his wife had taken with Mr. Leggeri, he was prepared to endure it, prepared to tolerate it to the extent of making no active interposition to prevent it, so long as he was personally assured of the fact that his wife still preferred him to Mr. Leggeri. This at first sight seemingly trivial incident brought home to him the fact that in truth and in fact the lady now preferred Mr. Leggeri to him. At that time he made up his mind that as she now preferred Leggeri to him there was no point or use in tolerating these conditions any longer.

The question which arises from these facts is, as I see it, this: just how far is a man entitled to overlook his wife's falling from the path of virtue before he takes action? The petitioner acknowledges freely that from the month of September, 1935, and for the succeeding nine months he knew perfectly well what his wife was doing. It was argued on his behalf that what he did on meeting his wife was really to afford her a series of condonations. I cannot accept that argument at all, because I do not think that there was any condonation; nor do I understand a doctrine of condonation in advance. When Mrs. Lloyd left her husband at the conclusion of the week-end visit, Mr. Lloyd knew where she was going and what she was going to do, and I do not understand at all any suggestion of condonation of adultery that is about to be committed.

But the strong argument on behalf of the petitioner was this, that the cases disclose throughout a general tendency which shows that in order to constitute connivance there must be some form of intention. Against that it can be said at once that the large majority of the cases deal with this question of connivance before any act of adultery was committed, and that very little guidance is to be had from the case law on the subject in dealing with connivance such as is alleged here, of a continuous series of acts. The question of intention before any particular act is committed does not appear to me to have anything like the same force when you are contemplating a series of acts some of which have already happened to the knowledge of the husband, as when you are contemplating the attitude of the husband before any act of adultery occurred.

Counsel for the respondent and the co-respondent adopt the position that intention is not the key, that any form of toleration by a husband amounts to connivance once knowledge is established, and for this there is undoubtedly quite clear warrant in the books; but I have not forgotten that the circumstances of this case are very, very far different from anything that was ever dealt with—I think I may say even contemplated—by people who dealt with kindred subjects a hundred years ago. There is no case that I have found reported in which the facts bear any relation at all to the present facts. No judge, so far as I know, has been asked to deal with a case in which the lady quite frankly admits that she has been the mistress of three men and had an adulterous association with two others. In no case I have had cited to me has a husband been shown who quite frankly acknowledges that he knew of her adulterous associations with two other men, and was quite cognizant over a period of months of her association with the last man, of whom he now makes complaint. Therefore, the balance seems to lie between, on the one hand, this doctrine of intention, and on the other the doctrine of toleration. Can such toleration as the petitioner accorded to this union between his wife and Mr. Leggeri be qualified as anything else than connivance?

A great number of these cases are contained in 3 Hagg. Ecc., in which both Sir John Nicholl and Lord Stowell give very valuable opinions upon this difficult doctrine. Sir John Nicholl in *Rogers* v. *Rogers* (1) said: "Passive acquiescence "would be sufficient to bar the husband, provided it appeared "to be done with the intention and in the expectation that "she would be guilty of the crime; but on the other hand "it has always been held that there must be a consent. The "injury must be volenti—it must be something more than mere "negligence; than mere inattention; than over-confidence; "than dullness of apprehension; than mere indifference: "It must be intentional concurrence in order to amount to "a bar. Thus in *Walker* v. *Walker* (Consistory, M.T. 1796) "Lord Stowell, after stating that the adultery was fully "proved; that the intercourse was for a long time carried "on with considerable secrecy, proceeded: 'The defence is "'not a denial of the fact, but that which, if established, is "'said to be equivalent in law. It is said that the husband "'connived; but they do not impute active means, but a "'passive consent. I take the position laid down by Dr. "'Arnold to be the true doctrine—that passive consent is "'sufficient; but there must be a consent, an acquiescence "'of his will; not mere negligence; not too high a confidence, "'or a misplaced confidence; there must be evidence that "'he was passively concurrent; that he saw the train laid "'for the corruption of his wife; that he saw it with pleasure, "'and gave a degree of passive concurrence to it.'"

That first passage I cited, I think, indicates just how difficult it may be to apply this doctrine. The learned judge says "passive acquiescence would be sufficient to bar the "husband." Taking that phrase by itself, no one would contend for a moment that in the ordinary meaning of language the petitioner in this case had not been guilty of passive acquiescence. But that is qualified—"provided it appeared

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(1) (1830) 3 Hagg. Ecc. 57, 59.

"to be done with the intention and in the expectation that "she would be guilty of the crime." Obviously the learned judge is contemplating an act of adultery to come, and means only passive acquiescence in an adultery which he sees is likely to happen, which is not in any sense the present case. Then he goes on to say: "It has always been held "that there must be a consent." Immediately, of course, it can be argued on behalf of the petitioner that he never consented at all; consent was never asked in any sense; nor did he ever after the fact in terms consent at all. Then the passage goes on: "The injury must be volenti—it must be something "more than mere negligence." One takes those two phrases together and sees that there is very little guidance there to the present case. I gather that to mean that the doctrine of "volenti non fit injuria" is to be applied here, just as you would apply it in the law of negligence, and in the law of negligence, when one applies that maxim to a particular case, one means that the person against whom it is being applied, was a person who had every possible means of knowledge and every possible means of preventing the danger which seemed to be approaching. Having taken no steps to prevent the danger, the party is said to be volens, that is, to be a party who has been willing in that limited sense. Take the case of a motor-car. I understand the doctrine to mean this: if a person in the car sees the driver driving at a quite immoderate speed and makes no protest at all, knowing well of the danger, he cannot afterwards be heard to complain that the driver went too fast. That does not mean that volens is to be translated as saying the party willed it in the sense of a wish that the man should drive at that speed. It only means that it was a consent in the sense that no steps were taken to protest, or stop the danger which was seen to be coming.

When one passes on to the quotation from Lord Stowell, again the guidance is not great. He talks of a passive consent; that there must be evidence in this consent or concurrence of the fact that he saw with pleasure what was about to happen with his wife. I cannot believe that the particular emotion disturbing his breast by what he saw can be any real criterion of connivance. I should have thought it would be quite sufficient if he contemplated an adultery that was possible in the future and he allowed it to happen, even though he might have regretted the fact that it was going to occur. In a later passage in *Rogers* v. *Rogers* (1) the learned judge, quoting from the judgment of Lord Stowell in *Moorsom* v. *Moorsom* (2), says this: "Though, to bar a husband, there "must be intention on his part, I have no difficulty in saying "that mere passive connivance is as much a bar as active "conspiracy." That statement taken by itself, of course, again puts the petitioner in my opinion completely out of Court. I find it very difficult to read the expression "mere "passive connivance" as meaning anything than standing by without taking any active step to interfere. It is said with force by counsel for the petitioner that his client was limited in the actions he could take; he had very little money; he had no control over his strong-willed and completely independent wife; he could not prevent her physically from going to Mr. Leggeri. But, of course, he had always open to him the action which he eventually took. He was always in a position to be able, first, to threaten her with divorce, and to threaten Mr. Leggeri with divorce, and secondly, if the threat were unavailing, to sue for divorce. When in truth and in fact he did take this action Mr. Leggeri did not at all desire to figure in a divorce suit for the sake of his housekeeper, the respondent. One cannot avoid the conclusion that had the action been taken earlier it would have had exactly the same result.

It is impossible to argue that there was nothing which the petitioner could have done, and, indeed, one is driven here to contemplate the question whether a man can ever be entitled to say, as the petitioner appears to have said to himself: "The mere matter of adultery does not seem to me to be "of crucial importance. Of course, I greatly dislike my "wife committing adultery, and wish she would not do it, "but I am not going to part company with her, or seek the "assistance of the Divorce Court on that ground. I will

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(1) 3 Hagg. Ecc. 57, 60.

(2) (1792) 3 Hagg. Ecc. 87, 107.

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"wait and see whether I can get her back, whether my "circumstances will not improve." Can he, to put it in another way, make his own law in the matter, and say: "The test with me is whether her affection has changed, not "whether she commits adultery, and I will ask the Court to "give me a decree on the ground of adultery when I find that "what I really care about has taken place, namely that her affec-"tion has now been taken from me"? That is not, as I understand it, the law of England. A man comes here for the remedy of a wrong. The wrong is adultery, and it would be going further, as I see it, than I have ever yet seen any other judge go, to say that a man may take the law into his own hands in this matter and make his own selection of what he thinks to be the real grievance that enables him to come here.

In *Rogers* v. *Rogers* (1) Sir John Nicholl says: "I have "already noticed that, to amount to connivance so as to bar "the husband, there must be circumstances fixing upon him "'intentional concurrence.'" The word "intentional" occurs often in subsequent cases, and I read that term "intentional concurrence" as being knowledgeable concurrence; but it is difficult to determine with any precision exactly the value to give to this word "intention." It seems to me one can make these cases consonant with one another if one reads the word "intentional" as meaning either intentional in the simple sense of knowing, promoting and encouraging a thing to happen before it happens—of course, those are the majority of cases where the alleged connivance is in advance of the first act—or, perhaps, in the somewhat more philosophical sense of knowledgeable concurrence, concurrence with intention in the sense of knowledge of all the circumstances. Read in either of these senses, some of the cases in one and some of the cases in the other, the cases do not seem to me to be very much at issue with one another.

In *Moorsom* v. *Moorsom* (2) Lord Stowell uses this language: "The presumption of law is against connivance; "and if the facts can be accounted for without supposition "of intention, the Court will incline to that construction."

(1) 3 Hagg. Ecc. 57, 71.

(2) 3 Hagg. Ecc. 87, 107.

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Now later on, on the same page, he says: "However, though "to bar the husband there must be intention on his part, I "have no difficulty in saying that mere passive connivance "is as much a bar as active conspiracy; he would be particeps "criminis." There, again, where one can get a really clear and unexceptionable statement, this statement seems to be that passive connivance is a bar. By that I understand Lord Stowell to mean that, if a man stands by and takes no step to prevent the commission of adultery by his wife, the mere fact that he may dislike her action or may even request her to desist does not relieve him from the stigma of passive connivance. Again on the same page he says: "The "expression of the books, of a man prostituting his wife, is "too strong, but the rule is volenti non fit injuria; that is "the true principle; active or passive, the husband is not "the object of legal relief."

The next case, the case which was pressed upon me very closely by counsel for the co-respondent, is *Crewe* v. *Crewe* (1), again the judgment of Lord Stowell. The important passage seems to begin at p. 131. "Another ground of "objection," said the learned judge, "is the connivance or "toleration of the husband." It is interesting to observe that it is at this stage the word "toleration"—a simple and easily understood expression—first comes into this line of cases. "He may have an insensibility to his own honour, "and, from a conformity to the corrupt manners of the world, "may have no wish to pursue a legal remedy, or may not "think it worth pursuing; and if such a person, after a long "continuance of toleration, of himself awakes, or is compelled "by the clamour and outcry of the world to awake, he awakes "too late. If the adultery has gone on for a length of time "he does not stand before the Court in the favorable light "of a person acting on the spur of honest feeling, whom the "law delights to succour; he has made up his mind to some "other satisfaction. I do not mean by this to say that the "husband is immediately to rush into Court upon suspicion; "he must wait for adequate proof, but he is to shew his

(1) (1800) 3 Hagg. Ecc. 123.

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"vigilance; he is not to lay by longer than to obtain proof; "if he does, his lethargy will be fatal to any application that "he may make: whatever his motives may be for coming "afterwards, if it be proved that there has been a long course "of criminal conduct of which he was cognizant, or which, "by law and by presumption, he must be supposed to have "been cognizant, he cannot receive relief."

That passage occurs in a judgment that was delivered nearly 140 years ago. I am not certain that every word of it could be or would be supported now. One has to make allowances for the cases in which under, perhaps, the somewhat laxer code of morals of to-day a husband, just as a wife, may be meritorious in overlooking delinquency on the part of the other spouse, and in condoning it for the desirable purpose of keeping a home for the children. Therefore I am not sure I would wish to endorse every word of that passage as being the law of England to be applied in all its severity to-day. From the petitioner's point of view there is a good deal in it. It seems to me to strike very hard at his method of defence—"he may have an "insensibility to his own honour, and from a conformity "to the corrupt manners of the world, may have no wish "to pursue a legal remedy." That may be a slightly grandiloquent way of describing the petitioner's actions during the months from September, 1935, to October, 1936, but it is difficult to see in what it differs. The judge suggests that the man whom he is contemplating here as tolerating his wife's adultery may have made up his mind to some other satisfaction. The petitioner appears to have taken the view that if he could get his wife back in the end, it was worth while—not shutting his eyes to it, that would be putting it too high—but tolerating his wife's infidelity for the time being. There again the case seems to be applicable. I should say the language there used seems to be appropriate to the present case. Is it fair to say that the petitioner was guilty of lethargy? It certainly is a toleration of a very lengthy and a very complete kind.

It is not in dispute that the parties continued their marital

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relations when they met. There is something to be said for a man who is endeavouring to win his wife back. The petitioner's attitude was "well, if we continue relations "when we meet there is some chance that she will return." Against that it is quite obvious that toleration becomes contentment. In such a case it can hardly be said that the husband was really strongly disapproving if he was for all this time prepared to share his wife with another man. The outlook of such a man is perhaps difficult to gauge. One has to try to understand it in these exceptional circumstances, and, try as best I can, it seems to me impossible to say that toleration which reaches such a pitch is not such lethargy as to be struck at by the words in this judgment. Again the learned judge in *Crewe* v. *Crewe* (1) goes on to say: "I come then to the next head of objection—namely, "connivance or toleration for other purposes: and this is "the part of the case which presses with most force. By "toleration I mean that passive sufferance of adultery for "a length of time which, in law, enures to a waiver of legal "remedy. The proof of this is difficult enough; for it must "arise in general not from a positive act but from negative "conduct—inactivity." Again I would point in this case to what is the cardinal factor in the petitioner's conduct—inactivity. "If information were proved to have been "conveyed to him, that would be decisive; and if there "be nothing of that kind, still the circumstances may be "so strong as to raise an almost certain presumption that "he has seen; and, if seeing, has tolerated." Of course, he was dealing there with the question of knowledge, but the learned judge seems to assume that, once the husband knew what was happening to his wife, as far as connivance was concerned, if he was any longer inactive, the matter was at an end.

Now passing from that stage of the matter to a later time, in which the matter was reviewed in the case of *Phillips* v. *Phillips*. (2) Dr. Lushington says: "The proposition is, "whether a culpable indifference (with a previous knowledge "of great indiscretion on the part of the wife) to circumstances

(1) 3 Hagg. Ecc. 123, 133.

(2) (1844) 1 Rob. Ecc. 144, 157.

"which ought to have called forth active interposition, but "where the co-habitation continued, and nothing was done, "is in the eye of the law connivance—conduct to bar a "separation a mensa et thoro. I need not say that it is my "duty to consider not what I conceive the law ought to be, "but what it is, and that I must gather from previous decisions "—an investigation, I am sorry to say, not altogether "satisfactory, perhaps from the very nature of the subject, "and the nice shades of distinction that may occur, the "difficulty may be inherent." That passage at least has some comfort for subsequent judges who have to deal not only with the pronouncements that preceded Dr. Lushington, but with the sometimes varying pronouncements which fell from the learned Doctor himself. He then proceeds to deal with practically all the cases such as *Rogers* v. *Rogers* (1), *Crewe* v. *Crewe* (2), and *Moorsom* v. *Moorsom* (3), which I have already reviewed. He introduces some little difficulty into the matter at the end of his judgment (4) by saying this: "I wish "it to be clearly understood that the ground of my so doing"—that refers to the decree which he has just pronounced—"is "that I do not find corrupt connivance proved in this case. "There must be knowledge, or presumed knowledge, of "adultery or improper familiarities leading thereto; not "finding any evidence of this description, I pronounce for "the separation."

Very great trouble was introduced at one time into the law of negligence by the interposition of the adjective "gross," and I think it was Lord Esher who did one amongst many signal services to the law by the observation that, so far as he was concerned, gross negligence was negligence with an epithet, and that there was no difference, therefore, in law between negligence and gross negligence. I cannot see that the matter here is clarified by the introduction—I do not know that Dr. Lushington was responsible for it—which runs through several of the cases of the word "corrupt." What the difference between connivance and corrupt connivance

(1) 3 Hagg. Ecc. 57.
(2) 3 Hagg. Ecc. 123.
(3) 3 Hagg. Ecc. 87.
(4) 1 Rob. Ecc. 164.

is I do not pretend to know. I rather suspect, though I say it with the deepest respect for people who used the expression before me, that corrupt connivance was connivance with an epithet.

One useful lesson that can perhaps be drawn from that case is that again the learned judge seems to have laid the greatest possible stress upon knowledge, and he obviously decides this particular case in the way that he does because knowledge was in his opinion absent.

Some fifteen years later came the case of *Allen* v. *Allen and D'Arcy*. (1) The case was tried by Hill J., and a jury, and the report contains apparently a full and verbatim account of the learned judge's summing up. He gives his direction to the jury in these terms: "To find a verdict of "connivance, you must be satisfied from the facts established "in evidence that the husband so connived at the wife's "adultery as to give a willing consent to it. Was he, or was "he not, an accessory before the fact? Mere negligence, "mere inattention, mere dullness of apprehension, mere "indifference will not suffice; there must be an intention on "his part that she should commit adultery. If such a state "of things existed as would, in the apprehension of reasonable "men, result in the wife's adultery—whether that state of "things was produced by the connivance of the husband or "independent of it—and if the husband, intending that the "result of adultery should take place, did not interfere when "he might have done so, to protect his own honour, he was "guilty of connivance." That case was really the high-water mark of the argument on behalf of the petitioner. It has to be observed that it was a direction to a jury who were dealing with a special case in special circumstances, and it may well be, therefore, that the learned judge was stressing the question of intention for purposes specially connected with the case. If it is intended thereby to lay down as a matter of law that there is no such thing as connivance unless the husband actually intends, in the sense of desiring, indeed ready to promote adultery, then I do not accept that as being a correct statement of the law. It seems to me entirely at

(1) (1859) 30 L. J. (P.) 2, 4.

war with all the citations I have made from Lord Stowell and Sir John Nicholl; and, indeed, with subsequent pronouncements on the subject. I think it is possible to read it in the way that I have suggested, that the "intending" there is only meant to denote if the husband had knowledge and passively acquiesced in what was going on. But I must, of course, agree with the argument that the ordinary meaning of the words he used hardly seems to be sufficiently explained by that interpretation.

In *Glennie* v. *Glennie and Bowles* (1), the Judge Ordinary, Sir Cresswell Cresswell, says: "I feel no doubt or difficulty "as to the judgment which I ought to pronounce. I have "to deal with two questions of fact as well as with the "question of law, as to the true meaning of the word "'connivance.' In dealing with the questions of fact, I am "not quite in the same position as a jury. I cannot, with "propriety, give a general verdict one way or the other without "referring somewhat to the evidence upon which it is founded." [His Lordship then examined the evidence as to the adultery, and said that he was of opinion that the charge was established beyond reasonable doubt. He continued]—"Then "comes the question as to connivance. On the subject "of connivance no language can be stronger than that used "by Dr. Lushington in *Phillips* v. *Phillips* (2)"—the judgment I have already read—"In his very elaborate and learned "judgment, Dr. Lushington adopts the language of Lord "Stowell, which was also very remarkable, and concludes "with these words: 'When I find Lord Stowell using the "'following language, I think I may consider myself, whatever "'be the consequences, justified in my decision: "In pro-"'"nouncing for a separation, I feel that I shall tolerate a "'"negligent inattention to marital duty, and that I shall "'"pronounce a decree which will not lead to the peace and "'"honour of families, nor to the purity of private life." If such "'consequences did not deter Lord Stowell, much less should "'they deter me, foreseeing as he did, and lamenting as I do "'in common with him, the effects they may have in

(1) (1862) 32 L. J. (P.) 17, 19.

(2) 1 Rob. Ecc. 144.

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"'matrimonial life.'" The whole of that citation, of course, was a citation of Dr. Lushington. Sir Cresswell Cresswell continued: "I find that language fully justified by the "opinions of Sir J. Nicholl in *Rogers* v. *Rogers* (1) and of "Lord Stowell in *Moorsom* v. *Moorsom.* (2) If it needed "corroboration, it would be found to have been adopted by "the Full Court in the elaborate summing up of Hill J. "in *Allen* v. *Allen and D'Arcy.* (3) I think that to establish "connivance it is requisite, not that the party conniving "should be actually an accessory before the fact, so as to "have taken any active measures to bring about the result "of adultery, but that he should be cognizant that such a "result would follow from certain transactions that he "approved of and consented to; and, therefore, on the "principle volenti non fit injuria, he cannot complain of any "act he passively assented to. And unless it can be said that "the petitioner in this case did actually shew by his conduct "that he expected and intended that the consequence of "adultery between his wife and the co-respondent should "result from their acquaintance, I cannot say that he "connived at their adultery." There again the principle of volenti is brought in, and brought in, as I understand it, upon the assumption that I have already considered. The learned judge seems to consider that if the petitioner was really cognizant of what was happening or what was likely to happen, he could not be heard to complain of the result.

In *Gipps* v. *Gipps* (4), there is a valuable opinion from Lord Westbury, then Lord Chancellor, in which he uses this language: "The next question is, what are the legal force "and effect of the words in the section 'conniving at the "'adultery'? The word 'conniving' is not to be limited "to the literal meaning of wilfully refusing to see or affecting "not to see or become acquainted with, that which you know "or believe is happening, or about to happen. It must include "the case of a husband acquiescing in, by wilfully abstaining "from taking any steps to prevent, that adulterous intercourse

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(1) 3 Hagg. Ecc. 57.
(2) 3 Hagg. Ecc. 87.
(3) 30 L. J. (P.) 2, 4.
(4) 11 H. L. C. 1, 14.

"which, from what passes before his eyes, he cannot but "believe or reasonably suspect is likely to occur. Still more "must 'conniving at' include the case of a husband who, "having discovered the adultery of the wife, takes a sum of "money from the adulterer upon an engagement not to "complain of the acts of the wife, but to abandon his legal "remedy, and then leaves the wife in such a situation as "cannot but facilitate the continuance or renewal of the "adulterous intercourse."

The second clause I am glad to say has no application to this case. There is no suggestion which I could for a moment accept that Mr. Lloyd really obtained any advantage. The first sentence I have quoted here, coming from the high authority of Lord Westbury, is, of course, a matter of the greatest importance. I have to consider, with this in mind, did the petitioner acquiesce by wilfully abstaining from taking any active steps to prevent an adulterous intercourse which he could but believe or reasonably suspect was likely to occur ? If one looks at his situation when he had become fully apprised of what was going on, it is very hard indeed to say he did not acquiesce by wilfully abstaining from taking steps to prevent what he knew was going to occur. He knew that she was going back to Mr. Leggeri, and that she would commit adultery again when she went back. In fact he appears to have put no term in his mind to the duration of this intercourse, and he only struck in the end because, as I say, according to the code which he made for himself, which forms no part of the law of England as I see it, he conceived that when her affections had passed from him he was entitled to a divorce, although he had never thought it worth while to ask for one when she began to his knowledge to commit adultery. Taking, therefore, this case, and the definition given in *Gipps* v. *Gipps* (1) as the nearest thing I have had to a definition of connivance, it seems to me that this case falls within Lord Westbury's definition of connivance.

I have had pressed upon me passages from the judgments or opinions of the other Lords who gave their opinions. Lord

(1) 11 H. L. C. 1, 27.

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Chelmsford in *Gipps* v. *Gipps* (1) says: "Connivance is a "figurative expression, meaning a voluntary blindness to some "present act or conduct to something going on before the eyes, "and is inapplicable to anything past or future. If a husband, "ignorant at the time of the wife's infidelity, afterwards "discovers it, and leaves it unnoticed and unpunished, what-"ever may be the motive of his silence, even if it be the base "and sordid one of making a profit out of his dishonour, he "cannot be said to connive at the past adultery, much less "at any future intercourse of the guilty parties." I must say for my own part that I have far less confidence in that definition of connivance than I have in the first definition that I have quoted from the opinion of Lord Westbury. I cannot help thinking, if one takes this opinion at its face value, that it must be concerned with a case not in the least parallel with the case I am considering now, but a case in which the adultery complained of was quite independent of any subsequent adultery on the part of the other spouse. I cannot imagine for a moment that anyone can have intended to lay down that if a man knew his wife was in close, intimate, adulterous association with another man he could not be said to connive at her adultery in future if he allowed that friendship, that close, intimate relationship, to continue without any interference upon his part. I think, therefore, that passage in the noble Lord's opinion is explicable only upon a conception of facts widely different from the facts I have to consider here.

Coming to modern times there are two very useful decisions of Lord Merrivale which point to the importance in this question of connivance of considering the bona fides of the person whose conduct is in question. In *Lankester* v. *Lankester and Cooper* (2), the parties sought a divorce in the United States. They resided together in the State of South Dakota long enough to be able to obtain a divorce, and then having complied with the very meagre requirements of the law of that State for the purposes of securing a divorce, the wife, having obtained a decree, remarried. Lord Merrivale, in

(1) 11 H. L. C. 1, 27.

(2) [1925] P. 114.

dealing with the case when the husband brought his petition and sought to allege the co-habitation of the spouse with a man in South Dakota after the decree, said that the conduct of the husband in his view amounted to connivance and being an accessory to the adultery of which he was complaining. What the husband apparently had done was to get some formal opinion, from a somewhat unlikely source, and probably with no faith in it at all, and to have taken this course as a means of seeking the easier relief. It is not surprising, in the circumstances, that Lord Merrivale declined to believe that the petitioner in that case was acting with any bona fides concerning this divorce in South Dakota, and accordingly held that he had connived at the co-habitation of his spouse with another man subsequently to the decree, of which he was then complaining in the British Court.

In *Clayton* v. *Clayton and Sharman* (1) he distinguishes the case very sharply from the case of *Lankester* v. *Lankester*. (2) In that case the bona fides of the petitioner was in Lord Merrivale's view firmly established. He was satisfied that the petitioner in that case was acting in the most perfect good faith in getting an American divorce, and when he subsequently learned, to his surprise, that the American divorce was of no avail, and that it so happened that his wife had subsequently married another man, Lord Merrivale allowed him to plead that subsequent co-habitation as cause for a divorce in this country, and declined to find connivance against him.

Then I come to my own decision in *Greenwood* v. *Greenwood*. (3) In that case, which was again one of very exceptional circumstances, the wife had been perfectly cognizant for upwards of fifteen years of the fact that her husband was committing adultery with another woman, had made a series of arrangements with her husband varying, I think, from deeds of separation and payments by lump sum, and had wilfully shut her eyes, or in the expression used by Lord Stowell and Sir John Nicholl, found some other means

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(1) [1932] P. 45.
(2) [1925] P. 114.
(3) [1937] P. 157.

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of satisfaction. She had taken the view that the question of adultery was really not a matter of importance to her so long as she could obtain proper means of subsistence, and after having taken that view for fifteen years or upwards she found herself destitute. It was an exceedingly sad case and she came here in desperation, saying that she found herself destitute and that she now felt herself driven to rely upon the adultery of her husband. In that case I had no doubt whatever that I must refuse her petition, because obviously the line which she had taken throughout evinced a case of conduct conducing, conducing to such an extent that I could not possibly exercise any discretion of the Court in her favour. I put the ground upon undue delay. This was a delay of fifteen years or more, and it could not possibly be said that a person coming in that way came with any amount of merit before the Court. But I dealt with the question of connivance and expressed my view—I see no reason to dissent from it now—that that case was really a case amounting to connivance. There was a lady who knew all the facts and, knowing her remedy, fully elected for a long period of years not to take it; in other words, to use the expression used by Lord Stowell, she tolerated, and having tolerated for a long period of years, she could not in my judgment be allowed to come and change her view and say that having tolerated for a long time she now wished to take the opposite course.

Finally in *Poulden* v. *Poulden* (1), Bucknill J., dealing with the first case of the kind, I think, under the new Matrimonial Causes Act, pointed out that the Act had the effect of changing the burden of proof in matters of connivance. I think no one can possibly doubt that the learned judge's statement of the law is correct, and that whereas before the Act was passed the burden of proof in a matter of connivance alleged by the respondent lay upon the respondent, that burden is now shifted, and where the circumstances of the case suggest connivance the burden is upon the petitioner to satisfy the Court that connivance does not exist.

Now having reviewed the cases, the matter stands in

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(1) Ante p. 63.

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this way: Is this toleration for nine months on the part of the petitioner fatal to his case? As I understand the law of connivance it is fatal to his case. The respondent comes before the Court with no merits at all. It is only fair to say that she has not claimed to have any. Indeed her only reason for defending the case, as she says, is that she dislikes the way in which her husband has set about the business of divorcing her. If he had set about it in a manner that commended itself to her she was quite willing to pay the proper penalty for her manifold delinquencies. I have not, therefore, been impelled to the course I have taken by any kind of sympathy for the respondent. She has claimed none, and she has received none at my hands. I am only concerned with the question of the petitioner's conduct from the point of view of the law of this country, and laying it down as best I can it seems to me to amount to this, that a man may not stand by and tolerate his wife's adultery, meeting her, conversing with her, having intercourse with her, as this man did, and then thereafter, because of some private view of his own as to what a woman owes to her husband, complain of her violation of that private view and come here to seek a remedy at the hands of this Court.

I have no option in this matter but to say that this petition fails to surmount the fatal bar of connivance.

His Lordship dismissed the petition.

Solicitors: *O. L. Blyth; O. L. Richardson; L. Bingham & Co.*

W. L.

THE THEEMS.

1938
May 20.

Shipping—Collision—Limitation of Liability—Rate of interest—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

Although the usual rate of interest in the Admiralty Registry on the amount awarded as damages is now 5 per cent., the proper rate of interest on the sum representing the limit of liability, where there has been a limitation action is, as it always has been, 4 per cent.

LIMITATION OF LIABILITY.

This limitation action came before the Court for argument on the question of the rate of interest to be allowed on the limitation amount. The plaintiffs, Walford Lines, Ld., had obtained a decree of limitation, limiting their liability to 6945*l.* 6*s.*, being 15*l.* per ton on the registered tonnage of their steamship *Theems,* in respect of the damages arising out of a collision which took place in January, 1937, in the North Sea between the *Theems* and the defendants' trawler *Notre Dame de Lourdes.* The trawler sank in consequence of the collision with a loss of seven lives.

Actions were begun by the owners of the *Notre Dame de Lourdes* and by her captain, officers, and crew, and the legal representatives and dependants of such of them as had lost their lives, and these actions were settled on the basis that Walford Lines, Ld., should pay the present defendants 85 per cent. in respect of the claims for loss of or damage to property and 100 per cent. for the loss of life and personal injury. The claims exceeding the amount of the statutory limit of liability, the present limitation suit was brought.

Gordon Willmer for the defendants. The plaintiffs in their statement of claim offer to pay interest at 4 per cent., and this admittedly is the usual rate. But where there is no decree of limitation, and the damages are assessed by the registrar, interest since about 1922 has been allowed at the rate of 5 per cent. It is rather anomalous that there should be any distinction between the two, and, as the damages in limitation actions are not paid in full, there is all the more reason for raising the rate of interest. The principle is the same in both cases; the sufferer is awarded interest because he is being kept out of money notionally due from the moment of the collision.

[BUCKNILL J. Under Order XLII., r. 16, at common law you get 4 per cent. on the amount of your judgment. That shows the official view of what you are entitled to receive; why should it be more before judgment?]

It may be that the 5 per cent. allowed on reference is wrong; but, right or wrong, as the rate is now 5 per cent. the limitation rate should be the same. It should have been raised when the rate of interest on unlimited damages was raised. *The Northumbria* (1) merely decides that some interest is payable and no distinction is made between limited and assessed damages. Sir Robert Phillimore said (2): "There seems no "reason why interest should not accrue on the delay to pay "that limited amount, as well as in the case where the amount "is unlimited."

[Reference was also made to *The Dundee* (3) and *The Crathie*. (4)]

Owen Bateson and *Norman Craig* for the plaintiffs. The defendants have not raised the question of a higher rate of interest in the pleadings, and there is no reason for departing from the practice, which has always been followed, of allowing interest at 4 per cent. on the limitation fund: see Roscoe's Admiralty Practice, 5th ed., p. 234. Up to recent years the rate of interest on assessed damages was always 4 per cent., and at the present time there is more reason for lowering that rate than for raising the rate in limitation actions. Further, the principle is different. On assessed damages the allowance of interest is made "not as interest on a debt but as part of "the damages": *The Joannis Vatis (No. 2)*. (5)

BUCKNILL J. This is an interesting point, and I am very much obliged to learned counsel for the able way in which they have dealt with it.

(1) (1869) L. R. 3 A. & E. 6.
(2) Ibid. 13.
(3) (1827) 2 Hagg. Adm. 137.
(4) [1897] P. 178.
(5) [1922] P. 213.

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The matter arises in this way. Walford Lines, Ld., are the plaintiffs in a limitation suit in respect of a collision between the *Theems* and the *Notre Dame de Lourdes*. In consequence of the collision, the *Notre Dame de Lourdes* was sunk, and seven of the crew were drowned. The plaintiffs started this limitation suit, and in their prayer they offered to pay into Court a total sum of 3705*l.* odd, being 8*l.* per ton on the registered tonnage of the *Theems*, together with interest at the rate of 4 per cent. per annum from January 10, 1937, the date of the collision, until payment into Court, and to give bail for a further sum of 3242*l.* odd, the aggregate amount at 7*l.* per ton and interest as aforesaid for the same period.

Now, when the case came before the Court, Mr. Willmer on behalf of the defendants, while he did not contest the salient points of the case, namely, whether there was any privity on the part of the owners or as to the amount, raised the point, and I think quite properly, that the interest should be at the rate of 5 per cent. He said, and there is no doubt about this, that in the Registry the usual rate of interest in respect of damage claims has been 5 per cent. since about 1922. That rate of 5 per cent. is referred to by Lord Merrivale in *The Joannis Vatis* (*No.* 2) (1), decided in 1922, and I understand it is the rate at present; I do not think it is any absolutely fixed amount, but it is in the discretion of the learned registrar and the merchants. However that may be, it seems to me quite clear that the principle upon which interest is paid in these limitation suits is not by way of damages, but on the principle that the wrongdoer has been in possession of the money since the date of the collision, and that having had that money he has had the use of it, instead of the injured parties. That, I think, is quite clear from the judgment of Sir Robert Phillimore in *The Northumbria.* (2) In that case Sir Robert Phillimore says (3): "The principle adopted by the "Admiralty Court has been that of the civil law, that interest "was always due to the obligee when payment was not made, "ex mora of the obligor; and that, whether the obligation

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(1) [1922] P. 213.

(2) L. R. 3 A. & E. 6, 13.

(3) Ibid. 10.

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"arose ex contractu or ex delicto," and he cites in that case the judgment of his predecessor Dr. Lushington in *The Amalia.* (1) In that case Dr. Lushington said: "Upon what "ground then was interest given? Interest was not given by "reason of indemnification for the loss, for the loss was the "damage which had accrued; but interest was given for this "reason, namely, that the loss was not paid at the proper time. "If a man is kept out of his money, it is a loss in the common "sense of the word, but a loss of a totally different description, "and clearly to be distinguished from a loss which has "occurred by damage done at the moment of collision." Sir Robert Phillimore, in another part of his judgment in *The Northumbria* (2), says: "The principle still remains," in limitation actions, "that the liability to this amount attaches "from the time of the collision; and there seems no reason "why interest should not accrue on the delay to pay that "limited amount, as well as in the case where the amount is "unlimited."

Now it may be that in some cases the registrar in fixing the amount of interest in actions where there is no limitation, does take the view that he ought to award interest by way of damages; but it seems to me quite clear that in a limitation action that cannot be right, because the section which limits the liability of the shipowner limits it in terms to a sum of so much per ton. Sect. 503 of the Merchant Shipping Act, 1894, says he shall not be liable in damages beyond this 8*l.* and 7*l.* per ton, and if one was to say that in addition to that by way of damages he was liable for interest, it would be imposing on him a burden heavier than the statute imposes. The grounds on which interest is given in a limitation action, is, as I have said, that the wrongdoer had the use of the money since the collision and must pay to the injured party that sum which he in theory has made out of that money. Strictly speaking, in this case the plaintiffs are offering more interest than they would have to pay if there was no limitation at all, because it is quite clear from Mr. Roscoe's Admiralty Practice that in ordinary cases where there is loss of life, but

(1) (1864) 5 N. R. 164, n. (2) L. R. 3 A. & E. 6, 12, 13.

no limitation suit, interest is only payable from the date of the report. In this case, as I have already stated, the plaintiffs are offering, in accordance with the practice and in accordance with the decision of Sir Gorell Barnes in *The Crathie* (1), to pay interest on the life claims from the date of the loss.

Now that being so, what is the proper rate of interest? It is significant, I think, that in Roscoe's Admiralty Practice, 5th ed., published in 1931, although at p. 364 the author says: "By the report interest, usually at the rate of 5 per centum per "annum, is allowed on the amount awarded from a date "stated in the report," when he is dealing with actions for limitation of liability he says, at p. 244: "The rate of interest "under the present practice is 4 per cent. per annum."

What, then, is the proper rate of interest to be paid by a man who has, notionally, at any rate, been in possession of money which he ought to have paid to the injured party? That seems to me to be clearly stated in Order XLII., r. 16, which says in a perfectly general way that the rate on a common law judgment is 4 per cent., and I see no reason why that should not be the rate in this case. No case has been brought to my notice in which, in any limitation action for over a hundred years, more than 4 per cent. has been charged. It was 4 per cent. in *The Dundee* (2) in 1827, and that I hold to be the proper rate to-day.

Solicitors for the plaintiffs: *William A. Crump & Son.*
Solicitors for the defendants: *Bentleys, Stokes & Lowless.*

(1) [1897] P. 178. (2) 2 Hagg. Adm. 137.

E. C. M. T.

1938
May 5.

GERMANY *v.* GERMANY.

Divorce—Condonation—Wife's petition for dissolution of marriage—Restoration of offending spouse—Burden of proof of condonation—Petition dismissed—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 4.

Where in a divorce suit the respondent alleges condonation, the burden of disproof is shifted to the petitioner by virtue of s. 4 of the Matrimonial Causes Act, 1937.

Condonation implies not only forgiveness but restoration; but the test of restoration is not now the former simple test: did the parties go back under the same roof? The Court must consider the varying circumstances and varying conditions of different parties.

A wife, after presenting a petition for divorce on the ground of the husband's adultery, forgave him, on his giving up the woman, and resumed marital relations, though she did not stay with him at the house where he was living. Later she proceeded with her petition. The husband pleaded condonation.

Held, the wife had condoned his adultery:—

WIFE'S DEFENDED PETITION for divorce on the ground of her husband's adultery.

The marriage took place in 1928, and there was one child, a girl. An adulterous association developed between the respondent and a woman in the summer of 1936. At intervals of about a fortnight during the autumn of 1936 and the beginning of 1937 he continued to visit her. Early in February, 1937, the wife, fully realizing that her husband was committing adultery with the woman, left him. On some five or six subsequent occasions the husband had relations with the woman. The wife presented a petition for divorce in July, 1937, but, after a promise by the husband to break with the woman, which he fulfilled, she forgave him and returned to him and marital intercourse took place, though they did not live in the same house, and her intentions varied from time to time. Later the wife again left her husband and proceeded with the petition. By his answer the husband pleaded condonation.

Holroyd Pearce for the petitioner.

R. J. A. Temple for the respondent.

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LANGTON J. [reviewing the facts in his judgment, said :] The respondent, originally a dental surgeon, now practises as a physician, and is a man of education and standing in his profession. The petitioner, though a lady of his own rank in life, is not a highly educated person, and is therefore to be judged by slightly different standards when one attempts to appreciate her evidence. They lived a fairly happy life until 1936. In the summer of that year the respondent, while on holiday by himself at Blackpool, struck up an acquaintance with a young woman named Eleanor Stubley, and that acquaintance shortly after the stay at Blackpool developed into an intrigue. When the respondent returned from his holidays, according to his evidence, he made it quite clear to his wife that he had committed adultery with Miss Stubley, but I doubt whether that was really so ; I think that the petitioner was devoted to her husband and realized with reluctance that he was drifting away from her but not that he was actually committing adultery.

At intervals of about a fortnight after his return in 1936, throughout the autumn of 1936 and the beginning of 1937, the respondent paid visits to Miss Stubley in Newcastle, and at long last in February the wife did realize quite fully that her husband was committing adultery with the young woman. For a considerable period before the petitioner left the respondent in February, 1937, she had discontinued to occupy the bedroom which they had shared. After his wife left him the respondent continued his intrigue with Miss Stubley, and on some five or six occasions went to Newcastle and had relations with her. Such internal evidence as there was seems to show that there was no condonation up to that time. After they had been separated for some months the respondent decided to take divorce proceedings, and on July 19 the respondent was duly served with the petition. He then went to see his wife, and, realizing that the position was thoroughly serious, said that he was prepared to go then and there to Newcastle and break off his association unconditionally, completely and finally if his wife would agree to take him back and forgive the offence and drop her proceedings.

The correspondence is unreliable because it is one-sided, and very few indeed of the letters are really genuine productions from the respondent. In February, 1937, he was seeking assistance from a friend who was a solicitor, and the letters which he wrote to his wife were either submitted to or dictated by this solicitor friend. When a man is dealing with business relationships which may involve him in litigation I should be the last to say that this is an unwise procedure; but when one is proceeding in matters between husband and wife I am not so sure that the legal profession are always a happy guide. In these matters the sovereign test is sincerity, and no man requires assistance from outside, still less from legal advisers, to achieve sincerity. There are fortunately a few letters which were not inspired, and from these few letters I have obtained very considerable guidance.

[His Lordship recited passages from two letters which the respondent wrote on August 3, 1937, confirming his statement to his wife that he had finally broken with Miss Stubley. Those letters, his Lordship said, were not inspired but written in all innocence under the impression that the whole matter was concluded. Langton J. proceeded :]

The respondent fulfilled his promise. He went to Newcastle and broke finally with Miss Stubley, and there was no suggestion that he went back to her or that he had seen her since. He broke with her as he had promised, and returned and reported his action to his wife. That was confirmed by the two letters which he wrote on August 3. Between that date and the hearing of the case the petitioner changed her mind on two if not three occasions. Her whole course of conduct in keeping in quite close relationship with her husband went to show that she was in a most undecided frame of mind and she admitted in evidence that she had been wavering throughout.

In August the petitioner agreed to go to Blackpool and spend a fortnight in the society of her husband. She did not agree, as she might have agreed, that her husband, who was acting as a locum tenens to a doctor there, should go and sleep at the same lodgings, but it was incontestable that she went to her husband's address there with the child and spent day after day and an occasional evening as well in the society of her husband. She unmistakably told one of the witnesses that she would not be opposed to rejoining her husband when once she had the divorce, if he asked her to do so. What she was going to gain by such a procedure it is impossible to discover or imagine.

Now we come to a very important point, though it is not at all conclusive, and here the parties are wholly at issue. The respondent said on oath with considerable detail that on two occasions, once in the house where he was working as a locum tenens, and once in a motor-car, during this period, his wife agreed to marital intercourse. I think that he was telling the truth. Therefore on the issue whether there was marital intercourse between these parties after August 3, at the time when the petitioner came to Blackpool in 1937, I find as a fact that there was such marital intercourse. I am equally satisfied that on more than one occasion after the respondent came to Blackpool his wife agreed to forgive him.

The whole dispute in this case centres upon whether or not there was condonation by the petitioner. The respondent says there was. The petitioner says there was not. It therefore becomes really a question of what is the proper inference in law to be drawn from these facts. Does this or does it not amount to condonation? Fortunately, in most cases, when one has ascertained the facts, the law is not so difficult to apply. In this case the first difficulty has been to ascertain what the facts were, and when those facts are ascertained I still cannot find it easy to determine whether those facts amount to condonation.

To begin with, the burden of proof is now altered. Bucknill J. in a judgment which I readily follow, *Poulden* v. *Poulden* (1), has pointed out that under s. 4 of the Matrimonial Causes Act, 1937, the incidence of the burden of proof has completely altered. Mr. Temple put the case that there were now two burdens. I cannot think that the legislators ever meant to impose anything so complex and difficult upon

(1) [1938] P. 63.

those practising the law or upon subjects of the realm. I think they have altered the incidence of the burden of proof, but they have not added a burden, so as to make the difficulty of establishing cases twice as hard as it was before. The revolution is not quite so striking on the question of condonation as it is in connivance, because, as was pointed out by Bucknill J., and is recognized by everybody, there was a presumption of law against the existence of connivance before this Act, and that presumption has been swept away. There was not, as I understand it, ever any presumption of law in favour of or against condonation, but the burden of proving condonation lay with the party who alleged it, that is to say, lay upon the respondent. As the Act has altered the matter, the burden now lies upon the petitioner to show that there has not been condonation. I do not think in this case that the point is one of major importance, because although there has been difficulty, I have been able to arrive, as I have pointed out, at a certain determination of the facts.

The difficulty, with which I am confronted now, is whether as a matter of law the proper inference is that there has been condonation here. When one approaches this matter from that standpoint, it is not easy to get much guidance from decided cases. The old case of *Keats* v. *Keats and Montezuma* (1) contains an excellent charge to the jury by the Judge Ordinary, Sir Cresswell Cresswell, and there he gives great instruction on this question by his famous definition of condonation, in the following terms: "I have come to the "conclusion that condonation means 'a blotting out of the "'offence imputed, so as to restore the offending party to the "'same position he or she occupied before the offence was "'committed.'" That has been developed in subsequent cases, and notably by Lord Sterndale M.R. in *Crocker* v. *Crocker* (2), where Lord Sterndale pointed out that to constitute condonation there were two things you must have; not only forgiveness, but also restoration. That, I think, is really the doctrine of the old Ecclesiastical Courts as well.

(1) (1859) 1 Sw. & Tr. 334, 346. (2) [1921] P. 25.

The difficulty arises on that point of restoration. Forgiveness in this case there was, over and over again. I am quite satisfied about that. If forgiveness alone, in the sense that the lady agreed in the clearest terms, were enough, there would be no doubt at all. I am quite satisfied she forgave her husband in words in the telephone conversation of July 31, and thereafter on subsequent occasions when they were at Blackpool together, but the difficulty arises from the second part—namely, the restoration. As to that I think there is some useful guidance from Lord Chelmsford L.C. in his opinion in the House of Lords on the appeal of *Keats* v. *Keats* (1), where he said: "To say that condonation requires conjugal "cohabitation or connubial intercourse, leaves the nature of "the cohabitation or intercourse to be adapted to the varying "conditions and circumstances of different parties."

In earlier days when the matter was considered, this question of restoration admitted in apparently every case of a very simple test. People who came to seek the remedy of divorce were all well-to-do people. They all possessed at least one residence, if not two, and if one wanted to know whether there had been any restoration of the offending party one had a simple test—had they been taken back into the residence of the forgiving party? But now we have people of all conditions, of all ranks of life, coming to this Court, and many of them are compelled to live, for some periods of time, in different houses. In the present instance, Dr. Germany was pursuing the business of a locum tenens in another doctor's house, and it was convenient that he should live there. His wife came to Blackpool, obviously for his society. It would have been possible for him to give up the residence in the doctor's house and go to some lodgings with his wife, but it would have been no doubt an added expense, and there may have been powerful reasons against it. One has to realize that in modern times you will not get this simple test: did they go back under the same roof? I think that that was what the Lord Chancellor, Lord Chelmsford, was intending when he said he had got to look at this connubial intercourse—using it in quite a wide way—with the varying circumstances, varying conditions of different parties.

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(1) 1 Sw. & Tr. 334, 357.

I have to ask myself this question: what did this lady really intend and really do? That she intended to forgive him on July 31 I have no doubt at all, but thereafter she undoubtedly swayed from that intention. Not only did she sway away from it, she also swayed back to it, and when she came to Blackpool I think it would be beyond any powers of mine to find exactly what she intended to do. I think the probability is that she did not know herself, but what she did when she got there was to restore her husband to the position of a husband, save for the fact that she occasionally again wavered, and after she had parted from him wavered more strongly away from the determination which she had reached as early as July 31, and had again reached during her stay in Blackpool.

One has to ask oneself, therefore, on this question of restoration, whether the acid test must always be did she remain for a certain period of time of one mind, or did she actually go under the same roof for a particular time, and, if so, for how long? When one approaches the subject from that standpoint it seems to me to become almost impossible, or quite impossible, to apply any one acid test. One must look at all the circumstances. If a husband comes to one decision and means to act upon it, and then afterwards says: "Well, notwithstanding that I arrived at that decision "and acted upon it I am now going to take another line," it is clear that so far as a man is concerned there is no going back. One act of marital intercourse would always be construed as condonation. But in the case of a woman the Courts have been more lenient. This case is one in which the woman has put herself, as it were, deliberately in the hands of the man, perhaps being undecided as to whether she would do one thing or the other, but without warning him that it was merely a test. She seems to have tried out the experiment of returning to him, and after having tried it out, altered her mind, with the thought that perhaps after all she would like

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to go on with her proceedings. In this second determination she never seems to have been very clear, because according to what she said to one of the witnesses even though she went on with her proceedings she meant to give the respondent a chance of returning afterwards.

I am afraid that one cannot escape from the view that this lady has got a wholly wrong notion as to what condonation means, and that in fact she did condone her husband's adultery. She forgave her husband upon a condition, which was fulfilled. She acted upon her own forgiveness in going to him to Blackpool and so far as she then could in those circumstances restored him to the position which he had had before. The fact that she has wavered afterwards to my mind really is not the point. The real point is whether what she did originally, followed up by her conduct in going to Blackpool, amounts to condonation.

In my view, as I read the law, that amounts to condonation, coupled, of course, with the evidence, which I accept as being true evidence, of the conduct between the parties. For these reasons this petition fails.

Solicitors: *Maude & Tunnicliffe, for Stabler, Kesteven & Co., Sheffield; Collyer-Bristow & Co., for Ashington & Denton, Sheffield.*

W. L.

1938
May 23.

PERKINS *v.* PERKINS.

Divorce—Wife's decree absolute—Maintenance—Former husband's petition for reduction—Former wife's remarriage—Increased fortune—Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-ss.* 1, 2.

Where a woman, who has obtained a decree absolute of divorce on the ground of her husband's adultery, marries again, such remarriage is a factor which must be taken into account in considering whether her fortune has increased. Where in fact the second husband becomes a pecuniary asset to her, and she is saved the expense of maintaining a separate establishment and therefore to some extent saves on food, rent and household expenses, the former husband is entitled to a reduction in the amount of maintenance which he is bound to pay her proportioned to her increase in fortune, in accordance with s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, notwithstanding that his income has remained stable.

APPEAL from the decision of the Registrar dismissing a petition by a divorced husband for reduction of maintenance.

The marriage took place in 1922. The husband was at that time a widower, with one child, a daughter, aged nine years. A son was born of his second marriage in September, 1924. On July 27, 1933, the wife was granted a decree nisi for the dissolution of her marriage, on the ground of her husband's adultery, which was made absolute on February 5, 1934. On March 13, 1934, an order was made by consent whereunder the former husband was directed to pay the wife petitioner maintenance at the rate of 500*l.* per annum free of tax. The respondent then had a gross annual income of nearly 3000*l.* On March 3, 1936, the former husband petitioned for a reduction of maintenance on the ground that through a second marriage the petitioner had substantially improved her financial position. The Registrar dismissed the petition. The former husband appealed.

Norman Daynes K.C. and *Acton Pile* for the former husband. As a result of the decisions in *Hall* v. *Hall* (1); *Turk* v. *Turk*,

(1) [1915] P. 105.

Dufty v. *Dufty* (1), and *Bennett* v. *Bennett* (2), relating to the effect of s. 190, sub-ss. 1, 2, of the Judicature (Consolidation) Act, 1925 (3), in cases where maintenance is ordered until further order the Court has jurisdiction to regard all the circumstances on variation as if they were existing at the time of the original order. The old principles as to maintenance no longer apply in many cases, owing to a wife's right to property in her own name and other statutory rights. The wife has a husband to support her now, and the fact that he is holding a remunerative position becomes a vital factor for consideration. It would be reasonable to reduce the wife's maintenance to pin money, say, 100*l*. a year free of tax.

[Counsel also reviewed the present financial position of the former husband and of the wife's second husband, and cited the authorities relating to the insertion of or the deliberate omission of a dum sola clause in or from a maintenance order.]

Noel Middleton K.C. and *J. S. Watts* for the wife. The fact that the former husband has voluntarily settled a large sum of money on his daughter by a previous marriage should not be allowed to enure to the detriment of the wife. In law he has suffered no loss of fortune. In broad outline there is no great difference between my friend and myself on the principles applicable. In the eighty years which have elapsed since the Matrimonial Causes Act, 1857, was passed the Courts have completely boxed the compass on this question of maintenance. First security for the wife's maintenance was allowed, then by the Act of 1866 came monthly or weekly payments of maintenance, the Court being given a power to vary the amount if a husband was unable to pay, and later by the Act of 1907 the Court was given power to increase maintenance if the husband's fortune increased. Those provisions are now embodied in s. 190 of the Consolidating Act of 1925. (3) Now it has been laid down that where an order

(1) [1931] P. 116.

(2) (1934) 50 Times L. R. 445; 150 L. T. 460.

(3) 15 & 16 Geo. 5, c. 49, s. 190, provides: "(1) The Court may, if "it thinks fit, on any decree for "divorce or nullity of marriage, "order that the husband shall, "to the satisfaction of the Court, "secure to the wife such gross

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is made until further order, on the matter coming before the Court again the Court may take into account all the circumstances then existing. But the Court ought not to depart entirely from the original intention of the Legislature in the proviso, to lighten the burden if it has become unduly severe, in order to reopen the matter merely because one or other party wants to pay less or receive more.

[Counsel proceeded to deal with facts and figures and to argue that there was no case for a reduction.]

Cur. adv. vult.

1938. May 23. BUCKNILL J. This is an appeal from an order of Mr. Registrar Pereira, dated February 8, 1937, dismissing the petition of Hew Brazier Perkins (the husband) for reduction of maintenance payable to Millicent Brenda Perkins (the wife). The appeal first came before me on February 22, 1937, when it was adjourned, by consent, into open court in order that the husband might give evidence of his interest under his father's will.

In 1922 the husband married the wife. He was at that time a widower with one child, Rosalind, then nine years of age. A son, Antony, was born of his second marriage in 1924. In 1933 the wife obtained a decree nisi for the dissolution of

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"sum of money or annual sum of "money for any term, not ex"ceeding her life, as having regard "to her fortune, if any, to the "ability of her husband and to "the conduct of the parties, the "Court may deem to be reason"able. . . . . (2.) In any such "case as aforesaid the Court may, "if it thinks fit, by order, either in "addition to or instead of an order "under sub-section (1.) of this "section, direct the husband to "pay to the wife during the joint "lives of the husband and wife "such monthly or weekly sum for "her maintenance and support as "the Court may think fit or reason"able: Provided that (*a*) if the "husband, after any such order "has been made, becomes from "any cause unable to make the "payments, the Court may dis"charge or modify the order, or "temporarily suspend the order as "to the whole or part of the money "ordered to be paid, and sub"sequently revive it wholly or in "part as the Court thinks fit; "and (*b*) where the Court has "made any such order as is "mentioned in this sub-section "and the Court is satisfied that "the means of the husband have "increased, the Court may, if it "thinks fit, increase the amount "payable under the Order."

her marriage on the ground of the husband's adultery, and this was made absolute in February, 1934. The suit was undefended and no charge of any kind was made against the wife. In December, 1933, the wife filed a petition for maintenance and on March 13, 1934, an order by consent was made that the husband do pay to the wife during their joint lives and until further order as from the date of the decree absolute such a sum by way of maintenance as after deduction of income tax shall amount to 500*l*. per annum.

The husband's evidence shows that at the time when the consent order for maintenance was made he had a gross income of nearly 3000*l*. a year. At the time when the decree absolute was made the wife had small private means of her own, sworn by her to be much less than 100*l*. per annum.

When in March, 1936, the husband filed his petition for reduction of maintenance, he put forward his claim on the basis that his own financial position was worse and his wife's financial position was better since the date of the order. It is unnecessary to set out the details of the change in the husband's financial position. It is sufficient to say that on his own evidence it is clear that his position has not become worse, apart from the fact that he has seen fit to make two voluntary settlements on the child of his first marriage. It was said on his behalf that he was under a moral obligation to effect one of these settlements, but he is also under a moral obligation to make proper provision for the wife whom he has greatly wronged by his adultery. I therefore find that his financial position has not become worse since the consent order was made.

It was admitted by counsel on behalf of the wife that, having regard to the fact that the original order was made until further order, the Court had jurisdiction to review it although the husband's means had not in fact diminished, and the only ground for review was that the wife's fortune had increased. This follows from the decisions in *Bennett* v. *Bennett* (1); *Turk* v. *Turk* (2) and *Hall* v. *Hall*. (3)

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(1) (1934) 150 L. T. 460.

(2) *Turk* v. *Turk*, *Dufty* v. *Dufty* [1931] P. 116.

(3) [1915] P. 105.

The substantial point in the husband's petition is that since the decree absolute the wife has married again and it was argued on behalf of the husband that her financial position has thereby substantially improved. The problem as to the principle to be adopted by the Court when considering the effect of the re-marriage of the wife upon an order for maintenance is not free from difficulty. The question as to whether the husband ought to continue to provide maintenance for his wife after she has re-married has been considered in various cases. Bargrave Deane J. in *Sharpe* v. *Sharpe* (1) when ordering the husband to secure maintenance for the wife at the rate of 100*l*. per annum said that: "Then "comes the question, for what length of time should it be "payable? In my opinion it would be for the life of the "petitioner dum sola vixerit, because if she marries again, "there is no reason why the payment of this money should "be continued to her."

On the other hand Shearman J. in *Hulton* v. *Hulton* (2) made an order for permanent annual maintenance to the wife of 5000*l*. to be reduced on her re-marriage to 3500*l*., thereby indicating that the Court considered the husband in that case had a duty to maintain the wife after re-marriage, although at a lower rate than before her re-marriage.

The statutory provisions on the subject are these. Sect. 32 of the Matrimonial Causes Act, 1857 (re-enacted in s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925), empowered the Court when pronouncing a decree of divorce to order the husband to secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties it shall deem reasonable.

In 1861 Sir Creswell Creswell in the case of *Fisher* v. *Fisher* (3), when considering an application for permanent maintenance by the innocent wife, said: "The next point is "the period for which the payment to the petitioner shall be

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(1) [1909] P. 20, 23.

(2) (1916) 33 Times L. R. 137.

(3) 2 Sw. & Tr. 410, 414.

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"continued . . . . If she avails herself of the freedom con-"ferred by the decree of this Court and marries again, it "would be unreasonable to compel the former husband to "maintain her." In that case the Court ordered an annuity of 100*l.* per annum to be secured upon the wife. Again the same learned judge in 1865, in *Sidney* v. *Sidney* (1), where a similar application by the innocent wife was made, indicated that the order for maintenance would continue so long as the wife remained chaste and unmarried.

In 1866 the Matrimonial Causes Act was passed, which empowered the Court to make an order on the husband for payment to the wife during their joint lives of a reasonable monthly or weekly sum for her maintenance and support in cases in which the husband had no property on which the payments to the wife could be secured. The proviso to the section enacted that, if the husband afterwards from any cause became unable to make such payments, it should be lawful for the Court to discharge or modify the order. The section was silent as to the right of the husband to ask for discharge or modification of the order on the ground that the wife had re-married.

In 1889 in *Lister* v. *Lister* (2) the question arose whether the dum sola clause should be inserted in an order for permanent maintenance. In that case the Registrar had ordered one-third of the respondent husband's income to be secured to the innocent wife, and it was argued that this proportion of one-third was excessive if the maintenance was to continue in the event of the wife's re-marriage. Butt J. in his judgment said that the Court ought to have absolute discretion according to the facts of each case ; that in the case before him the husband had behaved badly and therefore the dum sola clause ought not to be inserted ; but that there were cases in which, if the dum sola clause were eliminated, he would not think it right to give so large an amount. The Court of Appeal upheld the decision. (3) Fry L.J. in the course of his judgment remarked that it must be inferred

(1) 4 Sw. & Tr. 178.
(2) 14 P. D. 175.
(3) 15 P. D. 4, 7.

(from the words of the statute) that the Legislature was clearly not unfavourable to the grant of the alimony being for the whole life of the innocent wife, and said: "the effect "of the section is to leave an unfettered discretion in the "judge in each case, and it would be wrong to lay down "any prima facie rule whether the annual sum should be "payable during the wife's whole life or until her second "marriage. It is the duty of the judge to exercise his "discretion according to the particular circumstances of each "case."

In *Wood* v. *Wood* (1) an innocent wife obtained a decree for the dissolution of her marriage on the ground of the adultery and cruelty of her husband. An order for permanent maintenance of 60*l.* per annum was made and the Registrar reported that the order should be made without a dum sola et casta clause. On appeal Sir Francis Jeune expressed the view that the clause ought to be inserted. The wife appealed to the Court of Appeal, and Lindley L.J. in the course of a written judgment, with which Kay and Bowen L.JJ. concurred, said: "The least that a man ought to do for the maintenance "and support of his wife, when he so disregards his own "duties to his wife as to drive her from her home without "any fault on her part, and practically force her to obtain "a divorce, is to do what he can, consistently with his means, "to maintain her in reasonable comfort, having regard to her "age, health and position in society, ... If, as in this "case, the husband's means are such that he can only allow "his wife a bare subsistence, and she has nothing, it seems "to us unjust to her that even this subsistence money should "cease merely because she may marry again. The continuance of the allowance may conduce very materially to her "marrying, and to her future comfort and happiness. On the "other hand, justice to him does not in our opinion, require the "cessation of so small an allowance on her marrying again. "Under the circumstances therefore, of this case viz.,—the "innocence of the wife, the misconduct of the husband, the "fact that the wife has no property, and the smallness of

(1) [1891] P. 272, 276.

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"the allowance to her it appears to us that the clause dum "sola et casta vixerit should be struck out."

Applying the test laid down by Lindley L.J. to the facts of this case, the husband has broken up the marital home by his misconduct, while the wife at the age of thirty-five years after the dissolution of her marriage had no material means of support apart from such maintenance as her former husband supplied. Under these circumstances it was considered fair and proper by the husband that he should provide the sum of 500*l.* a year free of tax to the wife and in my view under the present circumstances he should continue to make such provision to her, subject to a proper deduction due to the improvement in her financial position by her re-marriage.

The re-marriage of the wife in this case is a factor which must be taken into account when the Court considers whether the fortune of the wife has increased. From this point of view the second husband is in the nature of a pecuniary asset to her. What the value of that asset is, depends on the circumstances of each case. The present husband of the wife holds the rank of captain in the Royal Marines and is aged forty-one years. At the present time he has a government appointment abroad which he holds for two or four years, and the emoluments of his appointment are about 580*l.* per annum after deduction of tax, and a furnished house, in which the wife is now living with him. He is due to retire in about four years on a maximum pension of about 400*l.* per annum.

The result of the re-marriage to the wife is that she is saved the expense of maintaining a separate establishment of her own, and therefore to some extent saves on rent and food and household expenses. In my view the proper order to make in this case is that the figure of 500*l.* per annum free of tax be reduced to 350*l.* per annum free of tax, until further order, and to that extent the appeal is allowed.

Solicitors for the husband: *Evill & Coleman.*

Solicitors for the wife: *Campbell, Hooper & Todd.*

W. L.

1938
May 24,
25, 26.

SWETTENHAM *v.* SWETTENHAM (BY HER GUARDIAN).

Divorce—Husband's petition—Incurable unsoundness of mind—Care and treatment—Certification as a test—" Recovery " and " Cure "—Decree nisi—Supreme Court of Judicature (*Consolidation*) *Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 176 (*d*)*—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *ss.* 2, 3.

Under s. 176 (*d*) of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 2 of the Matrimonial Causes Act, 1937, and under s. 3 of the latter Act a petition for dissolution of marriage may be presented by a spouse on the grounds that the other spouse is incurably of unsound mind and has been continuously under care and treatment in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930, for at least five years immediately preceding the presentation of the petition.

A wife, at the date of the husband's petition, was in her eightieth year, the marriage having taken place in 1878, and since 1887 had been under care and treatment under several reception orders for periods varying from a few days to the last continuing period of upwards of eight years :—

Held, (1.) the wife respondent was incurably of unsound mind of by no means a violent or extreme kind ; (2.) on the facts of the case there was no distinction between " incurably " and " irrecoverably " of unsound mind.

HUSBAND'S PETITION for dissolution of marriage on the ground that the wife was incurably of unsound mind.

In this petition dated January 1, 1938, Sir Frank Athelstane Swettenham, of Stanhope Gate, W., sought the dissolution of his marriage with Lady (Constance Sydney) Swettenham, née Holmes, on the ground that she was incurably of unsound mind and had been continuously under care and treatment for at least five years immediately preceding the presentation of the petition.

The marriage took place on February 21, 1878, at Harrow parish church, the husband then being twenty-seven and the wife nineteen years of age.

By her answer through her guardian ad litem the respondent denied that she was incurably of unsound mind.

Particulars of the allegation having been ordered on the application of the guardian ad litem (her receiver appointed under the Lunacy Acts), the petitioner further alleged that the respondent was suffering from insanity of a confusional type, and had a history of intermittent outbreaks of mania, dementia, and hysteria ; that her conversation was rambling, erratic, and at times quite incoherent, inconsistent, and irrational ; that she suffered from delusions and hallucinations, her conversation and thought had a definite persecutory trend, her letters displayed similar characteristics, and her behaviour was abnormal and eccentric ; that the first attack of mental disorder was in 1887, and there were other attacks, of which the longest were one between 1904 and 1912 and the present one since 1928.

The parties had not cohabited since 1894. The petitioner sought a divorce in January, 1904, on the ground of the respondent's alleged adultery, and in April, 1904, the petition was dismissed with costs on the application of the co-respondent. In May, 1904, the wife prayed for a decree for restitution of conjugal rights. The petition was not defended, and a decree for restitution of conjugal rights was granted on October 25, 1904. The order was not complied with. On October 28, 1904, the wife was placed under care and treatment in pursuance of an urgency order and remained under treatment until May 1, 1912, when she was discharged.

In 1928 the wife was again placed under treatment in Scotland, and on May 2, 1930, under a further order, she was placed under care and treatment in a doctor's house, where she had remained ever since.

Evidence was given (inter alia) by the doctor in charge of the respondent, the doctor appointed by the Board of Control to visit her from time to time, and two mental specialists, Dr. R. D. Gillespie and Dr. Porter Phillips, who had visited the respondent since the inception of the suit on behalf of the petitioner and the guardian ad litem respectively.

William Latey for the respondent. In my submission the Court has to decide first whether the respondent is "of "unsound mind," a condition which is not defined by the Matrimonial Causes Act, 1937, and, if the Court decides that in the affirmative, whether that condition is incurable. The question whether she is "of unsound mind" is not concluded by the fact that she has been for over five years under care and treatment under a reception order. The Court is entitled to examine the facts on which the order was made. What degree of incurable unsoundness of mind is sufficient to justify the respondent being deprived of her matrimonial status? The test applied by Sir Gorell Barnes in *Oldroyd* v. *Oldroyd* (1), on the issue whether a spouse had lost the right to insist on restitution of conjugal rights, was as follows: "The truth is that in such cases it has become practically "impossible for the spouses to live properly together." The Court may be disposed to apply an even stricter test where dissolution of marriage is sought, as in this case. As regards the petitioner's attitude to his wife since the beginning of this century the Court may feel it incumbent upon it to consider the effect upon the wife's mind of the divorce and restitution proceedings in 1904. If the Court finds that the respondent is of unsound mind within the meaning of the Act, the question whether that condition is incurable or irrecoverable—in my submission the terms are synonymous—remains to be decided on the medical evidence.

[THE PRESIDENT called upon counsel for the petitioner to address him as to the meaning of "incurably" as applied to the facts.]

Melford Stevenson for the petitioner. "Incurable" refers to what can be accomplished by medical science. "Recoverable" contemplates the result of nature's healing work, and the Act has allowed for the possibility of "recovery" by the use of the words "care and treatment for a period of "at least five years." The mental specialists both agree that the possibility of "recovery" cannot be excluded, but that there is no known "cure" for the respondent's condition by operative remedies. The onus on the petitioner is satisfied by showing that there is no known method of treatment which will bring about a permanent cure. The disorder is sometimes submerged, sometimes active. The question of

(1) [1896] P. 175.

predisposition to insanity is an important factor in the question of recovery, and the medical evidence shows that the respondent is beyond practical hope of recovery.

[At the request of the President the definitions in the Oxford English Dictionary relating to " cure " and " recovery " were referred to.]

1938. May 26. THE PRESIDENT (SIR BOYD MERRIMAN). I will deal with this case as shortly as possible for one particular reason. Under the Rules relating to the service of the petition, those in charge of the patient have the responsibility of deciding, on the material at their disposal, whether the contents of the petition or the fact of the petition shall be communicated to the patient. In this case those responsible for the respondent were considering very anxiously whether it was necessary to make the communication before this case should come on for trial, lest the respondent, who is in the position of being able to read the newspapers, should first become apprised of it through the Press. Most unfortunately, before the decision itself had actually been made, or at any rate before it had been acted upon, she became aware of the fact through headlines and paragraphs appearing in the newspapers in anticipation of this trial; and, knowing that she reads the papers, I am anxious to say as little as possible, so as not to add to her trouble.

I am concerned to find, and the onus, of course, is on the petitioner, whether it is true that this respondent is incurably of unsound mind, and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. About the fact of her care and treatment, as defined by s. 3 of the Matrimonial Causes Act, for the prescribed period of five years, there is no possibility of controversy. That condition is fulfilled. It remains, therefore, to consider whether she is incurably of unsound mind. I have listened to arguments on the one side and on the other, the extreme position on the one side being that anything indicating predisposition to insanity is unsound mind, and on the other I have been adjured to

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consider whether the unsoundness of mind is such as to warrant the Court in breaking up the marriage tie. There is nothing about that in the section. I have to be satisfied that she is " incurably of unsound mind."

I have also listened to an argument, developed with great subtlety, on the distinction between " recovery " and " cure." I remain unconvinced that there is anything in that distinction at all, at any rate for the purposes of this case, and on the facts of this case. I have been referred to the Oxford English Dictionary, and it is not necessary to say more than this : that "to cure " is " to restore to health," and " incurable " is that which " cannot be cured," or is " incapable of being "healed by medicine or medical skill " ; " to recover," on the other hand, is " to regain health after sickness," and the condition of being " recoverable " is " capable of being "restored to a healthy condition," the condition of being "irrecoverable " is that of being incapable of being " restored "to health," which, it will be remembered, was the definition, or one of the definitions, of " cure " ; and finally " irrecoverable " is defined in terms as being " incapable of being "restored to health ; incurable ; past recovery."

There may conceivably be a case in which it may be necessary to consider whether there is really any substance in the distinction between the two. All I can say is that the facts of this case do not require any further research into this particular problem.

This lady has, in fact, for the last five years had done for her all that medical and nursing skill and care and attention and treatment can do for her. It is common ground in this case that at her age, and after her protracted illness, any more drastic treatment than this is out of the question ; but I am not prepared to draw, for the purposes of this Act, any distinction between the degrees of care and treatment which bring about cure or recovery as the case may be. At any rate, again for the purposes of this case, it is manifestly unnecessary to proceed any further with that inquiry.

I am satisfied, without saying any more, that although this is by no means an aggravated case of unsoundness of mind, or a violent or an extreme case, it is proved on the medical evidence, and not merely by the fact of certification —which, of course, alone would not be enough—beyond any doubt whatever that this lady is of unsound mind, and the only question which has caused me any doubt at all is the question whether, having regard to the medical evidence, it can be said to be proved that she is incurably of unsound mind.

With regard to that it is unnecessary to say more than this: that on the evidence on both sides I am satisfied that having regard to the long history of her illness, not forgetting in that connection the two very considerable periods during which she was restored, temporarily, at any rate, to health, but in particular having regard to the length of the last onset, which now extends over eleven years, and above all to her age, I am satisfied that there is no prospect of cure. That being so, I find that the petitioner has proved his case.

[His Lordship proceeded to state that there had been a faint suggestion, not supported by pleadings or particulars, that there had been something in the nature of conduct conducing. He continued :] For some nine years after the petitioner had broken off conjugal relations with his wife in 1894 she was at large, not subject to any certification; but on October 28, 1904, as is suggested on the face of the petition for certification, because of excitement due to legal processes, she was re-certified. Now during that year the husband had filed a petition against his wife and a named co-respondent, charging in circumstantial detail adultery over a prolonged period. That suit was dismissed at the instance of the co-respondent. It was followed by a suit for restitution by the wife against the husband, in which a decree was pronounced, in fact, only three days before this re-certification. She was detained for a long time after that. I cannot see, on the face of this history, that it would be possible for me, without much more convincing evidence, to find positively that it was the husband's conduct which had conduced to the wife's unsoundness of mind, and I make no such finding.

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THE PRESIDENT, in pronouncing a decree nisi, said that, having regard to the suggestions which had been made, and to the fact that he knew, and had been told, nothing of the petitioner's personal history since 1894, it would be a matter for consideration by the public officer charged with those duties whether he thought it necessary to make any and what further inquiries into the matter.

An order was made for the respondent's costs to be paid by the petitioner.

Solicitors for the petitioner: *Gordon, Dadds & Co.*
Solicitors for the respondent: *Lowe & Co.*

W. L.

THE SAINT ANGUS.

1938
May 25, 26; June 2.

Shipping—Collision—Unavoidable accident—Collision caused by master's sudden illness—Standard of ordinary maritime care.

On a fine clear morning the defendants' motor-ship, bound down Long Reach, River Thames, collided with the plaintiffs' vessel, which was lying moored outside a pontoon alongside the river bank. The motor-ship had a crew of seven hands. The master and mate took four hours on and four hours off in navigating the ship, and two A.B.'s took similar turns at the wheel. The three other members of the crew consisted of two engineers and a spare hand, who was an ordinary seaman.

Shortly before the collision, the A. B., who was steering, handed over the wheel to the master and left the bridge to go to the lavatory and stoke the galley fire. There were no other vessels under way in the reach at the time. Almost immediately after the A. B. had left the bridge, the master, who was feeling quite well, fainted, owing to the after-effects of food poisoning. As he fell to the deck he pulled the wheel over to starboard, with the result that the ship swung round until she was heading more or less up river and struck the plaintiffs' ship.

The defendants alleged that the collision occurred without negligence on their part:—

Held, that while too high a standard must not be laid down for a vessel of her class with a small crew, and while it might not be necessary at all times to maintain the position of the navigating officer on the bridge and the helmsman at the wheel, yet, in the circumstances, the position should have been maintained to the extent that there should have been, in addition to the navigating officer, a man on the deck who might have been able to get to the bridge in time to do something to avert the collision; and therefore, that the defendants had not established that they could not have avoided the accident by the exercise of ordinary caution and maritime skill.

ACTION of damage.

The plaintiffs, the owners of the steamship *Hartford*, claimed against the owners of the motor-ship *Saint Angus* in respect of a collision which took place between the two vessels off Greenhithe, River Thames, about 5.30 A.M. on July 10, 1937.

The *Hartford*, a vessel of 407 tons gross, was moored outside a pontoon and three other craft. The *Saint Angus*, a motor-ship of 392 tons gross, was bound down the river, making about eight to nine knots, manned by a crew of seven hands. Her lights had been taken in, as it was daylight,

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No negligence was alleged against the plaintiffs, but the defendants contended that there also was no negligence on their part, as the master, who at the moment was alone on the bridge, and was steering the *Saint Angus*, suddenly fainted owing to the effect of ptomaine poisoning, that he fell to the deck, and in falling caused the wheel of the *Saint Angus* to be turned to starboard, and it was impossible to prevent her port bow striking the starboard bow of the *Hartford*.

G. St. C. Pilcher K.C., *H. L. Holman* and *E. E. Addis* for the plaintiffs.

It is for the defendants to show the cause of the accident and that it was inevitable (*The Merchant Prince* (1)), and they have wholly failed. The story is inherently impossible. The master in falling could not have given the wheel three or four turns which would be necessary to get it hard over to starboard, and unless it was hard-a-starboard it would be impossible, on the defendants' story, for the *Saint Angus*, heading straight down river, to be found in collision heading more or less up river. Also, it is extremely improbable that the master could feel perfectly well, if suffering from ptomaine poisoning, could have a sudden fainting attack, and then recover so completely as to be able to navigate the ship again immediately after the collision. But, even if the story is true, the defendants have not discharged the burden of showing that the collision occurred without negligence on their part. The master ought not to have allowed the helmsman to leave the bridge without either calling the mate or at least having another man on deck. His own evidence was that it was his practice to have two men on the bridge.

R. F. Hayward K.C. amd *Peter Bucknill* for the defendants.

The defendants must show that the collision happened without any lack of ordinary—not extraordinary—maritime care and skill on their part: Marsden's Collisions at Sea, 9th ed., p. 3, *The Marpesia*. (2) They have given an explanation consistent with there being no negligence on their part, and the burden of proof has shifted back to the plaintiffs:

(1) [1892] P. 179, 189.

(2) (1872) L. R. 4 P. C. 212.

The Kite. (1) It is said that the collision could not have happened as the defendants allege; but the turning circle of the vessel is only about six of her lengths, and as soon as she had got partly athwart the river the ebb tide would turn her head very rapidly. The defendants cannot give every detail of the sequence of events; the master fainted; that is the strength of their case; there is no dispute that from heading down river the *Saint Angus* was more or less heading up at the time of the collision.

As regards having another man on deck, if that were to be held necessary, it would mean that one of the two men off duty would have to be called or the ordinary seaman would have to be on deck all the time; the two officers and the two A. B.'s take watch and watch and the two below must have time for rest and sleep. Too high a standard ought not to be laid down for a small vessel of the class of the *Saint Angus*. The master had no idea that he would faint, the helmsman would have returned to the bridge in a minute or two, and even if there had been another hand about the deck it is extremely doubtful if he could have got to the bridge in time to avert the collision. There is no authority on the point; the nearest case would appear to be *Ryan* v. *Youngs* (2), where a man died while driving a lorry, and it was held that his employers were not negligent as the man appeared to be in good health.

G. St. C. Pilcher K.C. replied.

Cur. adv. vult.

1938. June 2. HODSON J. read the following judgment. In this case the plaintiffs are the owners of the steamship *Hartford* and are claiming from the owners of the motor-vessel *Saint Angus*, having suffered damage by reason of a collision between the two vessels.

The following facts were admitted. The *Hartford* was lying moored in the River Thames off Greenhithe, shortly before 5.30 A.M. on July 10, 1937. The weather was fine and clear; the wind about S.W., a very light

(1) [1933] P. 154, 160.

(2) [1938] 1 All E. R. 522.

breeze, and the tide about two hours ebb of the force of about 3 to 3½ knots.

The *Hartford* was lying head to tide outside a pontoon and three other craft at a buoy about abreast of Globe Pier. The *Saint Angus*, under way down river, struck the *Hartford* and caused damage. No negligence was alleged on the part of the plaintiffs. On these admitted facts, the plaintiffs having established a prima facie case, it lay upon the defendants to show that they were not at fault.

Their defence was that the accident could not be avoided; that the *Saint Angus*, a motor-vessel of 392 tons gross, 145 feet in length, 24 feet in beam, was in Long Reach of the River Thames in the course of a voyage from London to Leith; that she was on a down river course to the southward of midchannel making 8–9 knots through the water; and that in these circumstances the master, who was at the wheel, suddenly fainted owing to the effect of food poisoning, and, falling to the deck, caused the wheel of the *Saint Angus* to be turned hard-a-starboard so that the collision followed.

The *Saint Angus* left her berth at 4 A.M. with a crew of seven hands. The master was on the bridge in charge of the navigation, and an A. B., David Young, at the wheel.

The river at the southern end of Long Reach is four to five cables from bank to bank with about three and a half cables of navigable water. At the time when the ship went off her course her exact position by reference to midstream is difficult to ascertain, but she may very well have been as much as 900 feet from the buoys on the south side of the channel. Nothing else was under way at the time.

The master had had tinned salmon for supper, about 7–8 P.M. the night before, but felt, as he said, perfectly fit. Shortly before the collision, the helmsman, Young, with the master's permission, handed over the wheel to the master; left the bridge to go to the urinal; and subsequently went to the galley in the after end of the ship, where he remained until the collision occurred, occupied, as I was told, in stoking the galley fire.

Almost immediately after Young left the bridge the master fainted and remembered nothing more until he was brought to by the shock of the collision, when he found his ship scraping along the side of the *Hartford* and heading more or less up-stream.

The defendants contended that the accident, having been caused in this way, could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill. The law applicable is laid down in *The Merchant Prince* (1), where Fry L.J. said: "The burden rests on the defendants "to show inevitable accident. To sustain that the defendants "must do one or other of two things. They must either "shew what was the cause of the accident, and shew that the "result of that cause was inevitable; or they must shew all the "possible causes, one or other of which produced the effect, "and must further shew with regard to every one of these "possible causes that the result could not have been avoided. "Unless they do one or other of these two things, it does not "appear to me that they have shewn inevitable accident."

The plaintiffs say that the defendants have set out to establish the cause of the collision and have not succeeded. As to this, they say that the story is incredible, that there is no proof of food poisoning and that if the master had fainted as a result of food poisoning he would have had premonitory symptoms giving him ample warning. They also said that a complete and immediate recovery following the faint is also impossible. I have heard medical evidence on both sides directed to the probable effects of food poisoning, and the likelihood of a sudden faint occurring without premonitory symptoms and followed by a complete and immediate recovery. It may be surprising that the master felt perfectly well until he was overcome by a sudden faint and recovered so completely as to be able to navigate his ship after the collision until he reached Barrow Deep; but I regarded him as an honest witness, and I believe that he gave a truthful account to the best of his recollection. He was a sober and healthy man of forty-seven years of age and no doubt not predisposed to admit that he felt ill or to advertise the fact.

(1) [1892] P. 179, 189.

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It is suggested that, even if I find that the master fainted, the story breaks down, as the usual symptoms of toxic food poisoning were not present, and moreover no other member of the crew, with the possible exception of the chief engineer, felt any ill-effects. I doubt whether it matters very much whether I find that the master's faintness was due to food poisoning or not, but in any event I am satisfied with the explanation given—namely, that the faint was consistent with the after-effects of food poisoning.

It was contended by Mr. Pilcher for the plaintiffs that, even if I was satisfied that the fainting attack occurred in the way in which the master described it, yet even so the defendants have not established the cause of the accident. It was argued that, if the master, standing on the starboard side of the wheel, gave it a sharp pull as he fell, the wheel would not turn more than half a turn before he let go, and that the rudder would not then have an angle of more than ten degrees upon it. I am advised that the electric steering engine would cut out when the wheel stopped, and that there is no reason to expect that it would carry the rudder over to a hard-a-starboard position : i.e., to an angle of about thirty-five degrees. There was nothing wrong with the steering engine, which worked efficiently after the collision. In these circumstances it is contended that the *Saint Angus* would, on the facts proved, have hit the bank at an angle of not more than about four points and beyond the place of the collision.

I do not accept the contention that it is necessary for the defendants to work out and give every detail of the sequence of events with mathematical precision. It is true that the master said he found the wheel hard-a-starboard and his vessel heading nearly up-stream when he came to, and this is not fully explained ; but I think that on the evidence the cause of the collision is reasonably plain. The *Saint Angus* may have been, as I have said, nearly 900 feet out from the buoys when the master fainted. The diameter of her normal turning circle at full speed would be about six times her own length with wheel hard-a-starboard. When the master fell, the wheel need not in the ordinary course of navigation have

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been exactly amidships, and in pulling the wheel over in his fall the master can have given the rudder an angle of as much as fifteen degrees. The *Saint Angus* was over 3 feet by the stern, drawing 11 feet 6 inches aft and 8 feet forward. This would, I am advised, quicken her turn with the assistance of the ebb tide as she swung in towards the shore, and enable her to brush across the stem of the *Hartford* at an angle of about eight points. When she came in contact with the *Hartford* her stern would go rapidly down-river so that she would be rubbing along the starboard side of the *Hartford* when the master came to. I think that the master was mistaken in thinking that the wheel was hard-a-starboard when he came to. He was not any too sure about how many turns of the wheel were required to bring the wheel into that position from amidships. He thought two-and-a-half to three turns. The helmsman said three or four turns would be needed. The surveyor's report of the injuries to the stem of the *Hartford* lends support to the view which I have formed as to the angle at which contact was first made between the two ships. I am not deciding the case, therefore, on the ground that the defendants have not proved the cause of the collision.

I now come to the part of the case which has caused me the greatest difficulty. The collision occurred because, when the master fainted, there was no one in a position to avoid the consequences of his faint. The question to be determined is whether, using the language of Sir James Colvile in *The Marpesia* (1), " something was done or omitted to be done, "which a person exercising ordinary care, caution and maritime "skill, in the circumstances, either would not have done or "would not have left undone, as the case may be."

The crew of seven were distributed as follows : The master and mate took four hours on and four hours off in navigating the vessel, and two A. B.'s, Young and another, took similar watches at the wheel. The rest of the crew consisted of two engineers and a spare man, who was an ordinary seaman. The mate's cabin was under the bridge, and the practice was to summon him in an emergency by giving three sharp taps with the heel on the bridge. It was not disputed by the master that it was proper to have more than one man on the bridge of the vessel. It has been forcibly argued before me by Mr. Hayward for the defendants that one must not lay down too high a standard in a vessel with a small crew such as this. Having been advised by the Elder Brother (1) on the matter, however, while I am not prepared to lay down that at all times it is necessary to maintain the position of the helmsman at the wheel and the navigating officer on the bridge in a vessel of this class, yet in the circumstances of the case I think that the position should have been maintained to the extent that there should have been a man on deck in addition to the navigating officer on the bridge.

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(1) L. R. 4 P. C. 212, 220.

The waters were dangerous waters. Although there were no other vessels under way in the river at the time, the ship was not in the open sea, and a fairway cannot be said to be clear when there are vessels, as in this case, moored along the side. The time from the master's fall to the time of collision would be probably not more than a minute and a half. Young had left the bridge and had gone first to the urinal and then to the galley, where he was when he felt the shock of the collision. Neither the mate nor any one else was on deck. I am not satisfied that, if Young or some one else had been on deck and keeping a good look-out, he could not, as soon as he saw that the ship was falling off two or three points, have got to the bridge in time to avoid the collision.

The defendants have not established therefore that they could not have avoided the accident by the exercise of ordinary caution and maritime skill. There will be judgment for the plaintiffs with costs.

Solicitors for the plaintiffs: *Holman, Fenwick & Willan.*

Solicitors for the defendants: *Stocken, May, Sykes & Dearman.*

E. C. M. T.

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(1) Note.—The case was tried by the learned judge assisted by one Elder Brother.

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May 23, 24;
June 17.

Shipping—Requisition—De facto and de jure governments—Arrest by Republican Government of Spain of vessel requisitioned by Nationalist Government—Foreign sovereign state—Comity of Nations—Jurisdiction—Immunity from arrest.

A Spanish ship registered at Bilbao, after that port had been captured by General Franco's forces, was requisitioned by the Republican Government. The vessel was not then in Spanish territorial waters. Subsequently, when in the Surrey Commercial Docks, she was requisitioned by the Nationalist Government, and the managing director of the owners made a declaration that he held the vessel at the disposal of the Nationalist Government. Thereupon, the Republican Government issued a writ in rem claiming possession of the vessel and served a warrant of arrest on her. The Nationalist Government entered an appearance under protest and moved to set aside the writ and arrest on the ground that the action impleaded a foreign sovereign state, namely, the Nationalist Government of Spain.

The Foreign Office stated that no other government except the Government of the Spanish Republic was recognized by His Majesty's Government as the de jure Government of Spain, but that His Majesty's Government recognized the Nationalist Government as a government which exercised de facto administrative control over the larger portion of Spain, and that the Nationalist Government was not a government subordinate to any other government in Spain :—

Held, that the Nationalist Government of Spain in law was for the purposes of the present case a foreign sovereign state, and that the writ and warrant of arrest must be set aside.

Motion by the Nationalist Government of Spain for an order that the writ in rem, issued on April 13, 1938, by the Republican Government to have possession of the steamship *Arantzazu Mendi* adjudged to them, be set aside on the grounds that the action impleaded a foreign sovereign state—namely, the Nationalist Government of Spain—which was in possession of the vessel by its duly authorized agents; that it was entitled to possession; and that, the dispute being between two sovereign states, the Court had no jurisdiction, or, alternatively, would not exercise its jurisdiction to decide the dispute.

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An appearance to the Republican Government's writ was entered on behalf of the owners of the vessel and Eugenio Renteria, her present master, and on April 20, 1938, a conditional appearance under protest by the Nationalist Government was also entered.

According to the affidavit filed in support of the motion by the Duke of Alba, the agent duly appointed by the Nationalist Government of Spain to represent that Government in England, the Nationalist Government was the only Government exercising governmental and administrative control in (inter alia) the Basque provinces of Spain, including Bilbao, and was not a subordinate government to any other government, and was accordingly the sovereign government of a sovereign state. The Government had exercised control over the Basque Province of Viscaya (including Bilbao) since June 19, 1937. The *Arantzazu Mendi* was requisitioned (in accordance with a decree of March 2, 1938) by the Nationalist Government on April 5, 1938, solely for their public purposes and in particular for use in defence of the territories of the Government and for carrying goods required by them in the civil war.

Eugenio Renteria, in his affidavit, stated that on April 5, 1938, he was serving on the *Arantzazu Mendi* as her master in the service of her owners, the Compania Naviera Sota y Aznar, when he was served in the London docks, where the ship was lying, with the notice of requisition, and he undertook to hold the possession of the vessel for the Nationalist Government.

At that time the *Arantzazu Mendi* was already under the arrest of the Court, as, following the order for requisition of the Republican Government, the owners had issued a writ in rem for possession. That action was discontinued on April 12, 1938, but the arrest was not raised.

The Nationalist Government also put in evidence the Foreign Office reply to a letter addressed to them in connection with the proceedings in another action, *Banco de Bilbao* v. *Sancha ; Same* v. *Rey*. (1) The reply, dated March 18, 1938, stated that no government other than the Government of the

(1) [1938] 2 K. B. 176.

Republic having its seat at Barcelona was recognized by His Majesty's Government as the de jure Government of Spain, but that His Majesty's Government recognized the Government of General Franco as a Nationalist Government at present exercising de facto effective administrative control over a considerable portion of Spain. "General Franco's Government "is not a subordinate Government to any other Government "in Spain. The question whether General Franco's Government "is to be regarded as 'the Sovereign Government of a foreign "'Sovereign State' appears to be a question of law to be "answered . . . . having regard to the particular issue or "circumstances in regard to which the question is raised."

According to the affidavit filed on behalf of the Republican Government by Ramon de la Sota, the late managing director of the company owning the *Arantzazu Mendi*, on December 15, 1936, when the ship was at Bilbao, he sent on board the present crew and on May 6, 1937, appointed the present captain. On or about June 19, 1937, when Bilbao was captured by the forces of General Franco, he (the deponent) still held the vessel at the disposal of the Basque Government, which moved its headquarters to Trucios and subsequently to Santander. On June 28, 1937, the vessel, being on the Bilbao register, was requisitioned by the Government of the Republic in pursuance of a decree of that date.

On and from that date he (the deponent) held the vessel at the disposal of the Government of the Republic until March 28, 1938, when he ceased to be managing director of the Compania Naviera Sota y Aznar. Since July, 1936, the ship had made a number of voyages between various places (none of them in Spain) and the United Kingdom, and the wages of the crew were paid from the proceeds of freight earned by the ship and other vessels of the company.

On April 5, 1938, when the vessel was purported to be requisitioned by the Government of General Franco, she was in London, and since December 22, 1936, had never been in Spanish territorial waters or entered or passed through waters over which the Nationalist Government of Spain purported to have control.

Sir Robert Aske K.C., *J. V. Naisby* and *R. F. J. Valls* for the

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defendants, the Nationalist Government, in support of the motion. The two main questions are whether the Nationalist Government of Spain is a foreign sovereign state, which is a question of law, and secondly whether it is recognized as a foreign sovereign state, which is a question of fact. The status of the Nationalist Government was settled by the decision in *Banco de Bilbao* v. *Sancha ; Same* v. *Rey* (1) where the Court of Appeal held that the Court was bound to acknowledge acts of a government which His Majesty's Government recognized as the de facto government of the area in question which included Bilbao, and that acts of the rival de jure government of the area must be treated as a nullity.

[BUCKNILL J. This is a different point. Does the doctrine of immunity from arrest apply to a government in administrative control but not recognized de jure ?]

In the view of His Majesty's Government it is not a subordinate government ; it must therefore be a sovereign government : *The Gagara.* (2) The defendants are in possession of the ship de facto, and are entitled to possession de jure, because, when their decree of requisition was made, they were the only government with the right to make such a decree. It can make no difference that the plaintiffs are also a foreign sovereign state ; the Court will not adjudicate between two sovereign powers : see *Haile Selassie* v. *Cable and Wireless Ld.* (3)

[Reference was also made to *Compania Naviera Vascongado* v. *S.S. Cristina* (4) and *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor & Co.* (5)]

G. St. C. Pilcher K.C. and *Owen Bateson* for the plaintiffs. The writ is not addressed to the parties interested in the ship, as it was in *Compania Naviera Vascongado* v. *S.S. Cristina* (4), and there is no ground for saying that the Nationalist Government is impleaded ; the defendants are the ship and Renteria, the master.

The defendants have not established that the Nationalist

(1) [1938] 2 K. B. 176.

(2) [1919] P. 95.

(3) [1938] Ch. 545. Since reversed by the Court of Appeal [1938] W. N. 263.

(4) [1938] A. C. 485.

(5) [1921] 3 K. B. 532.

Government is a sovereign state or that they had de facto possession of the vessel. The letter from the Foreign Office makes it clear that the Republican Government is still the only sovereign power recognized in Spain. *The Gagara* (1) does not deal with the point at issue here; there was no competing government in that case; the Esthonian Government had an informal diplomatic representative in this country and, further, had captured the vessel as a prize of war. The recognition accorded to the Duke of Alba is merely as a commercial agent, he cannot claim diplomatic immunity: see *Fenton Textile Association* v. *Krassin* (2) and cf. *Luther* v. *Sagor* (3), where the commercial representative had certain diplomatic immunities. The immunity asserted here can only be claimed through a government's diplomatic representative; that is one of the tests of a sovereign state. Sovereignty is quite distinct from administrative control; it has never been suggested in any reported case that there can be concurrent sovereignty over the same territory.

[BUCKNILL J. Sovereignty is government control.]

No, sovereignty is inherent in the body of the sovereign: see *The Parlement Belge*. (4)

It is by no means clear that His Majesty's Government have recognized the Nationalist Government; the Foreign Office letter is very ambiguous. It is impossible for a government to receive envoys from both claimants to the headship of the same state: see Oppenheim's International Law, 5th ed., vol. 1, p. 602.

On the question of possession, the vessel was trading for many months after she had been requisitioned by the Republican Government and before the Nationalist Government purported to requisition her, and at the time of the second requisition she was already, and still is, under arrest and in possession of the Admiralty Marshal. The Nationalist Government, therefore, have never had, even notionally, de facto possession; requisition merely gives a right to control, it does not give a right to possession. In *The Cristina* (5) the

(1) [1919] P. 95.
(2) (1921) 38 Times L. R. 259.
(3) [1921] 3 K. B. 532.
(4) (1880) 5 P. D. 197.
(5) [1938] A. C. 485.

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Republican Government was in actual possession of the vessel. There is nothing in the point that the dispute is between two states: *The Annette; The Dora* (1); the plaintiffs have invoked the jurisdiction of the Court, and the Court will not decline to exercise it.

[Reference was also made to *The Jupiter* (2), *The Jupiter* (*No.* 2) (3) and *Mighell* v. *Sultan of Johore.* (4)

Sir R. Aske K.C., in reply. The decision in *The Cristina* (5) was based on two grounds, the first of which was that a sovereign state was impleaded, and that is sufficient apart from the question of possession. The necessary result of allowing this action to continue is to call on the Nationalist Government to assert its title, and that is contrary to all the principles upon which the Courts have acted: see also *The Jupiter.* (2)

[BUCKNILL J. I feel that the Foreign Office ought to be consulted, and that I should not rely on a letter in another case written some months ago. I ought not to decide the issues raised here without the instructions of the Government.]

It may be assumed that the answer of the Foreign Office will be the same as it was in the letter of March 18. Sovereignty merely means exercising the powers of government not subject to any other control: see Westlake's International Law, vol. 1, p. 20, and the letter from the Foreign Office covers that point.

There can be two sovereign powers over the same territory: see *Luther* v. *Sagor* (6); see also *Bank of Ethiopia* v. *National Bank of Egypt and Liguori.* (7) The absence of diplomatic representation has no bearing on the matter; such representation is merely a sign of friendship. "International "intercourse through fully authorized diplomatic agents only "follows on recognition de jure (Hall's International Law, 8th ed., p. 103).

As regards possession, the defendants have done all they can to establish their de facto possession, considering that the ship was under arrest; the position would appear to be

(1) [1919] P. 105.
(2) [1924] P. 236.
(3) [1925] P. 69.
(4) [1894] 1 Q. B. 149.
(5) [1938] A. C. 485.
(6) [1921] 3 K. B. 532.
(7) [1937] Ch. 513.

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that the vessel was in the "possession" of the defendants although in the "custody" of the Admiralty Marshal.

[On the question of the reluctance of the Court to entertain suits between foreigners, *The See Reuter* (1) and *The Evangelistria* (2) were referred to.]

[Bucknill J. said that he would direct a letter to be sent to the Secretary of State for Foreign Affairs to ascertain whether the Nationalist Government of Spain was recognized by His Majesty's Government as a sovereign state.]

Cur. adv. vult.

1938. June 17. BUCKNILL J. read the following judgment. This is a motion on behalf of the Nationalist Government of Spain to set aside a writ in rem and the subsequent arrest of the Spanish steamship *Arantzazu Mendi.*

On April 13, 1938, the Government of the Republic of Spain issued the writ against the ship which is described therein as of the port of Bilbao, now lying in the Surrey Commercial Docks. The endorsement on the writ is as follows: "The plaintiffs claim to have possession of the "said steamship *Arantzazu Mendi* adjudged to them." The writ also joins Engenio Renteria, the late master of the ship, as a defendant. The writ was framed in this unusual way to enable the plaintiffs to take the point that the Nationalist Government of Spain could not be heard to say that it was directly impleaded by the writ. The proper form of a writ of summons in an Admiralty action in rem is prescribed by Order XI., r. 7, of the Supreme Court Rules, and is directed to the owners and parties interested in the ship. The writ in this action is therefore not in proper form. Order XII., r. 24, however, prescribes that in an Admiralty action in rem any person not named in the writ may intervene and appear on filing an affidavit showing that he is interested in the res, and Mr. Pilcher on behalf of the plaintiffs agreed that the case should proceed on the assumption that the Nationalist Government of Spain had filed their affidavits and had intervened. I have dealt with the case on the footing that the defendants, the Nationalist Government of Spain, have entered an appearance as interveners and are parties interested in the res.

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(1) (1811) 1 Dods. 22.

(2) (1877) 2 P. D. 241*n*.

The history of the ship so far as this present action is concerned is as follows :—

On May 1, 1937, the ship sailed from Barry to Dollarton in command of Captain Eugenio Rentaria, her present master, who was duly appointed by her owners, the Compania Naviera Sota y Aznar S.A.

On June 19 Bilbao was captured by the forces of General Franco, and on June 28 the ship was requisitioned by the Government of the Republic of Spain in pursuance of a decree of that date. On August 11 the ship arrived at London and on August 24 the owners of the ship issued a writ in rem for possession of the ship, and in pursuance thereof the ship was arrested in the Surrey Commercial Docks. A conditional appearance was entered on behalf of the Bay of Biscay Company, Limited (agents for the Republican Government) and also by the Government of the Republic of Spain. On September 8, 1937, an application by the defendants that the action be dismissed was adjourned, and an order was made that all proceedings be stayed pending the trial of another action in which the owners were parties and which was proceeding in the Chancery Division. The owners' action in rem was eventually discontinued on April 12, but the arrest has not been raised. An official of the Admiralty Registry informs me that the ship was not released from arrest upon the discontinuance of the action owing to the failure of the parties to make proper provision for the payment of the charges arising out of the detention of the ship.

On March 2, 1938, General Franco issued a decree and law the purport of which was (to use the words of the translation) to "requisition the *Arantzazu Mendi* on behalf of "the Government of the Nation for public services connected "with national defence, or the requirements of maritime "trade in its different aspects."

On March 23 the Assistant Spanish Consul in London, on behalf of the Republican Government of Spain, served the owners of the ship with a formal notice of requisition under the decree of that Government dated June 28, 1937.

On April 5 the accredited sub-agent of the Nationalist Government of Spain served a notice of requisition under the decree and law of March 2, 1938, upon the master of the ship. On the same day the agent endorsed a note of the requisition on the ship's papers and notified the owners thereof. On April 13 the then managing director of the owners of the ship made a notarial declaration in London that he freely submitted to the provisions of the decree of the Nationalist Government, and in the name of the owners gave his consent to the vessel being requisitioned at the free disposal of the Nationalist Government of Spain to the intent that it may make use of such vessel in the manner laid down in the said decrees and as it may consider most expedient.

On the same date, April 13, the Government of the Republic of Spain issued the writ in rem which the defendants are now seeking to set aside, and a further warrant of arrest was served on the ship. On April 21 the owners of the ship and the master entered an appearance to the writ. On the preceding day the Nationalist Government of Spain entered a conditional appearance to the writ and on May 7 filed this notice of motion to set aside the writ and arrest.

The first ground stated in the notice of motion for setting aside these proceedings is: "That the action impleads a "foreign sovereign state—namely, the Nationalist Government "of Spain, which is unwilling to submit to the jurisdiction of "this Court."

It is clear from the reported cases that the proper procedure for this Court to adopt when an issue is raised as to whether a party is a foreign state is to make inquiry upon the subject from His Majesty's Secretary of State for Foreign Affairs. The Court therefore directed the Registrar to send the following letter to the Secretary of State for Foreign Affairs: [His Lordship read the letter, which set out the relevant facts. Paragraph 5 of the letter was as follows:] "5. I have been "asked by the Honourable Mr. Justice Bucknill to ascertain "from the Secretary of State for Foreign Affairs, whether "the Nationalist Government of Spain is recognised by His "Majesty's Government as a foreign sovereign State."

The reply, dated three days later, on May 28, is as follows. It is from the Foreign Office and is signed by Mr. Walter Roberts: " Sir, With reference to your letter of May 25, "regarding the case of the S/S *Arantzazu Mendi*, I am directed "by Viscount Halifax to return the following answer to the "question asked in paragraph 5"—that is the question whether the Nationalist Government was recognized by His Majesty's Government as a foreign sovereign state—

" (1.) His Majesty's Government recognise Spain as a "foreign sovereign state. (2.) His Majesty's Government "recognises the Government of the Spanish Republic now "having its seat in Barcelona as the de jure Government of "Spain. (3.) No Government other than that referred to "in the preceding sub-paragraph is recognised by His Majesty's "Government as the de jure Government of Spain or any "part thereof. (4.) The Nationalist Government of Spain is "a Government in conflict with the Government of the Spanish "Republic established at Barcelona. It claims to be the "Government of Spain and is seeking to overthrow the "Government of the Spanish Republic and to establish its "authority over the whole of Spain. (5.) His Majesty's "Government recognises the Nationalist Government as a "Government which at present exercises de facto administrative control over the larger portion of Spain. (6.) His "Majesty's Government recognise that the Nationalist Government now exercises effective administrative control over all "the Basque Provinces of Spain. (7.) His Majesty's Government "have not accorded any other recognition to the Nationalist "Government. (8.) The Nationalist Government is not a "Government subordinate to any other Government in Spain. "(9.) The question whether the Nationalist Government is "to be regarded as that of a foreign sovereign state appears "to be a question of law to be answered in the light of the "preceding statements and having regard to the particular "issue with respect to which the question is raised."

A letter in very similar terms from the Foreign Office dated March 18, 1938, was before the Court of Appeal in *Banco de Bilbao* v. *Sancha; Same* v. *Rey.* (1)

The question which I have to decide is the question of law whether these facts as proved by the letter from the Foreign Office of May 28 constitute, according to English law, the Nationalist Government as a foreign sovereign state.

Sir Robert Aske on behalf of the Nationalist Government argued that the essential ingredients of a sovereign state are that it administers and governs the territory over which it has control, and that it is not subordinate to any other Government. In support of this proposition Sir Robert Aske relied mainly upon *The Gagara* (2) and the *Banco de Bilbao* case. (1)

In *The Gagara* (2) the ship was arrested in this Court in an action for possession in January, 1919, by a corporate body who had been the owners of the ship before its confiscation by the Bolshevik Government in 1918. Subsequently the ship proceeded to Reval, where she was captured by the Esthonian Government, condemned as a prize of war by a decree of the government, and registered as under the ownership of the Esthonian Republic. The Esthonian Government appeared under protest to the action in rem in this Court and took the same point which is taken here by the Nationalist Government of Spain, that the ship was the property of a foreign sovereign state.

In the course of the proceedings before Hill J. the Foreign Office and the law officers informed the Court that His Majesty's Government had for the time being provisionally recognized the Esthonian National Council as a de facto independent body, and that it was the view of His Majesty's Government that the Esthonian Government was such a Government as could, if it thought fit, set up a Prize Court. Upon this information Hill J. set aside the writ and arrest. Hill J. said in the course of his judgment that if for the time being the Esthonian National Council was recognized as a de

(1) [1938] 2 K. B. 176. (2) [1919] P. 95.

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facto independent body, and the Esthonian Provisional Government was recognized as its executive, the Courts of this country must for the time being recognize it also. And if it was recognized as an independent body, by which he understood a political body for the time being independent of every superior authority, he must recognize it as a sovereign body capable of exercising sovereign rights, including the rights of making capture jure belli and entitled to have its sovereignty respected by the courts of this country. The case was taken to the Court of Appeal who affirmed the judgment of Hill J.

I have to consider whether the decision in *The Gagara* (1) is an authority in favour of the Nationalist Government of Spain in this case. Mr. Pilcher on behalf of the Republican Government of Spain argued that there were several important differences between *The Gagara* (1) and the present case, in that in *The Gagara* (1) (*a*) there was no rival government in Esthonia; (*b*) the Esthonian Government had an informal diplomatic representative in England; and (*c*) the Esthonian Government had captured *The Gagara* and condemned her as prize, a proceeding which, if done by a Prize Court in Esthonia, this Government would have apparently considered as valid. Moreover in that case the Government recognized the Esthonian Government as a de facto independent body; in other words, a body independent of every superior authority. In this case the Government merely recognizes the Nationalist Government of Spain as a Government which exercises de facto administrative control over the larger part of Spain, and as a body which is not subordinate to any other government but is in conflict with the Government of the Spanish Republic. In *The Gagara* (1) the facts were more in favour of the recognition of the Esthonian Government as a sovereign body than they are in this case.

The question which I have to decide is whether the facts placed before me constitute the Nationalist Government as an independent sovereign state in law. It may well be that a neutral sovereign power cannot in terms recognize the independence of any government seeking to overthrow by force the

(1) [1919] P. 95.

de jure government, without in some measure departing from its own neutrality. The armed struggle mainly concerns that very question of independence, and a neutral power, by recognizing the independence of the de facto government while the struggle continues, would anticipate that which must be finally established, if at all, by agreement or by force. It may seem a contradiction in terms that there should be two sovereign governments in Spain, where formerly there was only one such state, but I think that there may be, in the eyes of the law, two sovereigns, one de facto and one de jure, in the same country. It seems to me that the law, based on the reality of facts material to the particular case, must regard as having the essentials of sovereignty a government in effective administrative control over the territory in question and not subordinate to any other government, because their decrees are the only legal authority which governs the area to which the subject matter of the dispute belongs. This is the result in my view of the decision of the Court of Appeal in the *Banco de Bilbao* case. (1)

That case, so far as it is relevant to the present case, had as its cardinal issue the question as to the validity of certain decrees made by the Republican Government of Spain with reference to the constitution of the Bank of Bilbao, a corporate body having its corporate domicil in Bilbao. These decrees were made after the Nationalist Government had acquired sole administrative control over the province in which Bilbao is situate. As I have already stated, the Court of Appeal had before it a letter from the Foreign Office in similar terms, so far as the status of the Nationalist Government is concerned, to the letter which I have already read from the Foreign Office to the Registrar of this Court. It is important to notice the interpretation which the Court of Appeal placed upon this information from the Foreign Office. Clauson LJ. on this point said :—" The only question open to argument arises "from the fact that His Majesty's Government recognize the "Spanish Republican Government with its seat in Valencia "or Barcelona as the de jure Government of the whole of

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(1) [1938] 2 K. B. 176, 195, 196.

"Spain, but at the same time recognize the insurgent Government of General Franco as the Government de facto of the "area in which Bilbao is situate."

Clauson L.J. went on to say that :—"this Court is bound "to treat the acts of the Government which His Majesty's "Government recognize as the de facto Government of the "area in question as acts which cannot be impugned as the "acts of an usurping government, and conversely the Court "must be bound to treat the acts of a rival Government "claiming jurisdiction over the same area, even if the latter "Government be recognized by His Majesty's Government "as the de jure Government of the area, as a mere nullity, "and as matters which cannot be taken into account in any "way in any of His Majesty's Courts. Thus in the Courts "of this country no regard can be paid for the present purpose "to the legislation enacted by the Republican Government "which during the material period cannot be treated in this "Court as the government of the area in which Bilbao is "situated."

It may be argued that although this decision of the Court of Appeal may be vital to the decision in this case, if and when this Court decides the question which of the two rival decrees of requisition of the *Arantzazu Mendi* should be recognized by this Court as valid, yet the decision does not in terms decide the question at present before the Court—namely, the question whether this Court ought to refuse to exercise jurisdiction at all on the ground that the Nationalist Government is a foreign sovereign government.

In my view the question of law which I have to decide also underlay the decision of the Court of Appeal. It is clear from the judgment of the Court of Appeal that it considered that the question as to what is the Government whose laws govern the constitution of the Banco de Bilbao had been settled by the principles laid down by the Court of Appeal in *Luther* v. *Sagor*. (1) In that case the information from the Foreign Office which was before the Court of Appeal was that His Majesty's Government recognized the Soviet

(1) [1921] 3 K. B. 532, 551.

Government as the de facto Government of Russia, and the Court of Appeal held that this amounted to a recognition by this Government of a sovereign state into the validity of whose acts the Court could not enquire. Warrington L.J. in that case said that in his opinion " there is no difference for the "present purposes between a government recognized as such "de jure and one recognized de facto. In the latter case, as "well as in the former, the government in question acquires "the right to be treated by the recognizing state as an "independent foreign state, and none the less that our "Government does not pretend to express any opinion on the "legality or otherwise of the means by which its power has "been obtained." On this ground the Court of Appeal refused to enquire into the validity of certain acts of the de facto Government relating to the acquisition by that Government of certain property which was claimed by the plaintiffs in the action before the Court. The Court of Appeal in the *Banco de Bilbao* case (1) treated the letter from the Foreign Office as a recognition of the Nationalist Government as the government de facto of the area in which Bilbao is situate, and the Court of Appeal in *Luther* v. *Sagor* (2) treated a government de facto as a foreign sovereign state. It seems to me therefore that the decision of the Court of Appeal in the *Banco de Bilbao* case (1) supports the argument that the Nationalist Government of Spain is for the purposes of this case a foreign sovereign state.

When considering what are the essential qualities of a foreign sovereign state for the purpose of this motion, one must consider the reason why the Court refuses to exercise jurisdiction in a case where an admittedly foreign sovereign state is impleaded, or where the action is against certain property in the possession or control of such state. The principles underlying this immunity from legal process have been recently considered in the House of Lords in *The Cristina.* (3) The decision indicates that the act of the Crown in declining through its Courts to exercise the sovereign

(1) [1938] 2 K. B. 176.
(2) [1921] 3 K. B. 532.
(3) [1938] A. C. 485.

power of jurisdiction over property within its territorial limits, when that property belongs to a foreign sovereign, is based on the theory of an international comity which induces a sovereign state to respect the independence of another sovereign state, and in pursuance thereof to decline to exercise by means of its Courts any of its territorial jurisdiction over the public property of such other state when in the ordinary course of things it would become amenable to such jurisdiction. To make such a thing workable it seems that the criterion of a sovereign state for the purpose of such legal immunity must be its absolute independence in law of any superior authority. I think that such independence arises if no judgment against that state in this Court can be enforced by any process of law in any Court in its own territory, and if on the other hand such foreign state, having sole administrative and judicial control in its own territory, is able to extend reciprocal immunity from legal process in its Courts to the property of another sovereign state.

The point raised on this motion appears to me to be novel and difficult. My view is that a Government which has acquired the position and power ascribed to the Nationalist Government of Spain in the letter from the Foreign Office to the Court is in a position to grant to a sovereign state such immunity from legal process and such reciprocity in that respect as is the backbone of the principle of legal immunity granted to the foreign sovereign state by the law of this country.

For this reason, and for the reason that in my judgment the decision of the Court of Appeal in the *Bank of Bilbao* case (1) which I have already discussed, supports the argument of the defendants on this motion, my judgment is that the Nationalist Government of Spain in law is for the purposes of this case a foreign sovereign state.

A point was also taken by Mr. Pilcher who opposed the motion on behalf of the plaintiffs, that the Nationalist Government had not got possession of the ship and that therefore

(1) [1938] 2 K. B. 176.

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the rule laid down by the House of Lords in *The Cristina* (1) did not apply. I do not see any substantial difference between this case and *The Cristina* (1) on that point. In my view the Nationalist Government has done all that it can legally do to obtain possession of the ship consistently with the fact that the ship was already under arrest by warrant of this Court. The Nationalist Government has in fact got a limited possession through the ship's master, who, according to his affidavit, is on board the ship and has undertaken to hold the possession of the ship for the Nationalist Government of Spain and recognizes the sole authority of the Nationalist Government. Moreover, the Nationalist Government is impleaded by this action as a party interested in the res, and properly before the Court under protest as a foreign sovereign state. For these reasons I must set aside this writ and the warrant of arrest on the ship, which was based upon the writ.

Solicitors for the Nationalist Government: *H. A. Crowe & Co.*

Solicitors for the Republican Government: *Petch & Co.*

E. C. M. T.

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(1) [1938] A. C. 485.

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TEALL *v.* TEALL.

Husband and wife—Summary jurisdiction—Maintenance order—Husband's alleged adultery—Time limit for complaint—Constructive desertion on ground of husband's adultery—Intention to persist in course of conduct—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Summary Jurisdiction (Separation and Maintenance) Acts,* 1895 *and* 1925 (58 *&* 59 *Vict. c.* 39), *s.* 4; (15 *&* 16 *Geo.* 5, *c.* 51), *s.* 1—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 11.

Where a wife applies for maintenance on the ground of adultery under s. 11 of the Matrimonial Causes Act, 1937, she must lodge her complaint, in pursuance of s. 11 of the Summary Jurisdiction Act, 1848, within six months of the last act of adultery complained of, and there is no warrant for the six months' time limit running from the discovery of the adultery: dictum of Hill J. in *Dutch* v. *Dutch* (1928) 45 Times L. R. 33 disapproved; *Natborny* v. *Natborny* [1933] P. 1 distinguished.

Where a wife, on applying for such order, alleges constructive desertion on the part of the husband by reason of his adultery, she must show intention on his part to persist in an adulterous association, as contrasted with the mere discovery of past offences.

APPEAL from maintenance order by magistrates.

The parties were married in December, 1908. On March 18, 1938, the magistrates of the petty sessional division of St. Augustine, Kent, heard a summons by the wife for maintenance on the ground of the husband's alleged wilful neglect to maintain, desertion, and adultery, the last named charge being made under s. 11 of the Matrimonial Causes Act, 1937. (1) Mrs. Teall said in her evidence that in August, 1937, shortly after seeing her husband in company with another woman, she asked him how much longer he was going to keep the affair from her. He admitted that he had done wrong but said that she had driven him to it through refusing marital relations for eighteen months. On December 10, 1937, he showed her a letter from his solicitor referring to possible affiliation proceedings if he did not pay the woman in question a certain sum. Mrs. Teall had a nervous breakdown and left her husband in January, 1938.

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(1) 1 Edw. 8 & 1 Geo. 6, c. 57, s. 11: (1.) Among the grounds on which a married woman may apply to a court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, for an order or orders under that Act there shall be included the ground: "that her "husband has been guilty of "adultery."

(3.) " On any application made "by virtue of this section, the "court shall not make an order "unless it is satisfied that the "applicant has not condoned or "connived at, or by . . . . her "wilful neglect or misconduct "conduced to, the adultery ". . . ."

On behalf of the husband, who did not give evidence, it was submitted that there was no case. The submission was overruled, and the magistrates granted a maintenance order, coupled with a non-cohabitation clause. They found that the solicitor's letter was sufficient corroboration of the husband's adultery, and that the wife was forced to leave him in consequence of his adultery and his treatment of her. They granted the wife custody of a child of the marriage under sixteen years of age. There was also inserted in the order a finding of wilful neglect to maintain.

The husband appealed mainly on the grounds (1.) that there was no evidence that he had committed adultery within six months before the complaint was lodged; (2.) that there was no evidence of his persisting or intending to persist in the adulterous association, and that mere discovery of past adultery did not justify a plea of constructive desertion on the ground of adultery; and (3.) that the magistrates did not satisfy themselves that the wife had not conduced to her husband's adultery by refusing marital intercourse.

Greer Jackson for the appellant.
R. T. Barnard for the respondent.

1938. June 15. THE PRESIDENT (SIR BOYD MERRIMAN). This is a husband's appeal from the magistrates of the Petty Sessional Division of Saint Augustine, Kent, against an order finding that the husband had been guilty of desertion, guilty of adultery, and guilty of wilful neglect to maintain, upon which the justices made a non-cohabitation order and gave the wife custody of the child and ordered maintenance for the wife who had the child. It is common ground that, in so far as the order depended upon the finding of wilful neglect to maintain, there was no evidence before the magistrates on this point at all. That finding must have been included inadvertently in the order. It will, of course, on the subsequent hearing be open to the wife, if she can, to establish that ground of complaint, and the whole matter will be gone into afresh by the magistrates.

Adultery as a substantive ground of complaint under the Summary Jurisdiction (Married Women) Act, 1895, was added for the first time by the Matrimonial Causes Act, 1937. A question has been raised whether on a substantive complaint of adultery the time limit of six months from the time when the matter of such complaint or information arose, which is imposed by s. 11 of the Summary Jurisdiction Act, 1848 (1), applies to a complaint of adultery, and, if it does apply, whether it applies to the date when the adultery was committed or to the date when the committing of the adultery was discovered. I have no doubt whatever that the wording of s. 11 of the Matrimonial Causes Act, 1937, necessarily involves that, in common with the other grounds of complaint accorded by the Summary Jurisdiction (Married Women) Act, the time limit of six month applies. There is no sort of qualification in the section making adultery a substantive ground of complaint and it seems to me necessarily to follow that the time limit applies.

Mr. Barnard has argued that the Legislature must have intended the time limit to apply to the discovery of the act of adultery and not to the adultery itself because, as he points out, there would be in some cases manifest hardship if adultery committed outside six months were only discovered too late to make it the ground of complaint. That may be so, but, on the other hand, it is easy to see that there are manifest objections to it, and manifest causes of hardship might arise if the applicability of the time limit were made to depend upon questions whether adultery committed a long time ago was actually known, whether there were means of finding it out, whether it was enough, for example, that some of it was known and the rest concealed, and other questions of that sort. Speaking for myself I am quite certain the Legislature were not contemplating the introduction in this simple provision of anything else than that adultery, not the discovery of adultery, should be made one of the grounds on which the Summary Jurisdiction Act operated. I am not oblivious of the fact that in two cases to which I have been referred the cases of *Dutch* v. *Dutch* (1), and *Natborny* v. *Natborny* (2), the suggestion has arisen whether under the corresponding provisions for setting aside an order on the ground of adultery under s. 7 of the Act of 1895 the time for complaint ran from the adultery or the discovery of the adultery. Nobody has decided that discovery was the test under that section. I can see no warrant for the suggestion that, in the plain words of s. 11 of the Matrimonial Causes Act, 1937, the time limit is applicable to anything but the adultery itself.

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(1) 11 & 12 Vict. c. 43, s. 11: (i.) "In all cases where no time is "already or shall hereafter be "specially limited for making any "such complaint or laying any "such information in the Act or "Acts of Parliament relating to "each particular case, such complaint shall be made and such "information shall be laid within "six calendar months from the "time when the matter of such "complaint or information respectively arose." This section is applied to complaints under the Summary Jurisdiction (Married Women) Act, 1895, by s. 8 thereof.

From this it follows that in order to succeed upon adultery as the substantive ground of the complaint the burden was upon the wife of showing that the adulterous association continued within the six months period. The evidence on which adultery in the six months period can be found in any given case will be precisely the same class of evidence as that on which the issue would be disposed of in these Courts. It is, of course, impossible to exclude from consideration an association and evidence tending to show that that association was adulterous during the period before the six months. What is required, however, is positive evidence from which adultery may be inferred to have been committed within the six months—in other words, such evidence as shows that the association was adulterous and that there was an opportunity for indulging in it on one or more specific occasions within the period of six months. That, in my

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(1) 45 Times L. R. 33.

(2) [1933] P. 1, 8, 14.

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opinion, was the burden which the wife was bound to discharge on the question of adultery before she could ask for a maintenance order on that ground.

The case took rather an unfortunate course. At the end of the wife's evidence the husband submitted that there was no case to answer, not merely on this question of adultery, but on the question of desertion and on the question of failure to maintain. The justices overruled that submission, whereupon the husband stood upon the submission and called no evidence although he was present in Court. Mr. Greer Jackson has asked us to set aside the finding on the ground that on the face of the record of the proceedings there is no evidence of adultery within the six months and correspondingly no evidence of desertion. He tells us—though there is no record of this—that the submission dealt specifically not merely with there being no evidence of adultery, as would appear to be the submission from the face of the note, but that the attention of the magistrates was directed specifically to the point that there was no evidence of adultery within the six months. The magistrates may have had their attention directed to that—I am not declining to accept the statement that Mr. Greer Jackson has made upon instructions—but it was quite clearly not the point which was uppermost in their minds at the time when they made their ruling, for they decided the point on the ground that the evidence given by the wife of the contents of a certain letter on which the appellant's solicitor did not cross-examine was sufficient corroborative evidence of the appellant's adultery. There is nothing there to show that they were directing their minds at all to the question whether there was sufficient evidence of adultery within the six months.

We have examined and re-examined this evidence as it was recorded. Speaking for myself I am quite satisfied that there was ample evidence on which the magistrates could find the husband guilty of adultery, and I agree with them more particularly now that I have seen the letter. I am amply satisfied that the letter from the husband's solicitor to the husband saying that he had offered the young woman with

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whom he was alleged to have committed adultery 50*l.*, payable by monthly instalments, in respect of the expected birth of a child, with the alternative of affiliation proceedings, was ample corroboration of the wife's evidence that in effect the husband had confessed to adultery. None of that touches the point whether the adultery had been committed within the six months.

We are going to send this matter back to the magistrates (it would not be fair to reverse their decision having regard to the course the case took). When the issue is opened afresh with this point in their minds there may be quite different evidence available on the question of the time until which this adulterous association continued. On the face of the note as it stands it seems to me to be impossible to affirm with certainty that any adultery was shown to have been committed within the six months before the alleged complaint. The wife herself spoke of discovering a letter which led her to go round to a certain address in Ramsgate, as a result of which she went to see a young woman in what may have been a nursing home in Ramsgate, and she recognized her as having been the woman she had seen with her husband in the preceding August, that month being outside the six months limit. Then a week later she spoke to her husband. In effect, without using the words, he admitted that there was an affair, and the next day, December 10, showed his wife the letter to which I have just referred. It seems to me to be impossible from that evidence as it stands to infer that the husband's confession was a confession of a persisting association of an adulterous character for this reason, if for no other, that the very letter itself from his solicitor to him, which the wife saw, shows that he and the young woman in question were already at arm's length. Therefore the date up to which the adulterous association ends is left completely in the air. The whole matter must be investigated afresh with the point clearly in mind that it is necessary for the wife if she is to succeed on an issue of adultery to establish that the adulterous association was persisted in during the six months preceding the complaint, In substance the same point applies to the charge of desertion. In saying that, I am not overlooking the fact that desertion itself is a continuing offence, and once a state of desertion is established and nothing has occurred to interrupt it, the mere fact that the desertion began outside the six months limit is neither here nor there. That does not bar the complaint. In this case the desertion is of a kind which is always described as "constructive desertion," that is to say, physically it was the wife who left the matrimonial home, but she is alleging that it was her husband's conduct which drove her from the matrimonial home. In substance—although there is not a definite but rather a faint reference to earlier misconduct—she is saying that it was the discovery of the adultery and this adulterous association which caused the nervous breakdown and drove her from her home.

I do not propose to review all the authorities which have been examined on this point. It is sufficient for me to say that Mr. Barnard with characteristic frankness has admitted that he cannot produce any authority for the proposition that the mere discovery of an adulterous association, uncoupled with any suggestion that it is still subsisting, or that there is an intention on the part of the husband to persist in it, is, of itself, enough to entitle the wife to leave home. I should have used the words " discovery of a past adulterous "association." In other words, to entitle the wife to leave home and to say that her husband had deserted her on the ground of an adulterous association, there must be some element of an intention to persist in the adulterous association as contrasted with the mere discovery of past offences. Here, again, for the reasons I have already given in connection with the evidence of adultery itself, we are left in a complete state of doubt how the matter really stands.

It is enough to say, as the matter is going to be re-investigated, that on the face of the note there is nothing to show that at the time when the wife discovered this adulterous association there was any intention on the part of the husband to persist in it, nor, as I have already said, was there any evidence that it was at the time a subsisting association.

Amongst the matters which the magistrates will be entitled to consider is the issue which has been raised of conduct conducing. Under the Act of 1937 the magistrates have to be satisfied that there was no conduct conducing. That matter, with the rest, will be open to the magistrates when the matter comes before them for re-hearing.

HENN COLLINS J. I agree, and for the same reasons. I want to add that for the reasons given by my Lord the burden was upon the wife to establish adultery within the time limit. We are told that the question of the importance of the time limit was brought to the magistrates' attention. I am accepting that, but their finding makes no reference to it at all. What they have, in fact, found is that they were satisfied on the evidence given by the wife of the contents of a certain letter, on which the appellant's solicitor did not cross-examine, that there was sufficient corroborative evidence of the admission of adultery. The evidence of the appellant's adultery was an admission deposed to by the wife in these terms: "I admit I have done wrong, but you have driven "me to it as you have not slept with me for 18 months." Taking that finding of adultery I cannot but think that it had slipped from their minds that to make that finding complete they should have added, if that was their intention, evidence of the appellant's adultery within six months of the summons. I cannot think, myself, that although it was, no doubt, mentioned to them, that it was present to their minds, or that they ever, in fact, found adultery within the time limited. For those reasons this case must go back.

Case remitted to magistrates.

Solicitors: *Wilberforce, Allen & Bryant, for Walter Hills, Shea & Girling, Margate; Mowll & Mowll, for Mowll & Mowll, Canterbury.*

W. L.

1938
June 27;
July 28.

WATSON *v.* WATSON.

Divorce—Desertion—Deed of separation—Husband's desertion recited—Deed repudiated by husband—Continuing desertion—Duty of the Court—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2 (*b*).

A married couple entered into a deed of separation after the husband had deserted the wife, and the fact of such desertion was recited in the deed. The terms of the deed were not carried out by the husband. The wife nine years after the execution of the deed prayed for divorce on the ground of desertion.

Held, that, as the husband deserted the wife before the execution of the deed and its terms were not observed by him, and the petitioner did not seek to enforce it, the execution of the deed was merely an incident in the desertion, and the husband's desertion continued for three years and upwards immediately preceding the presentation of the petition, and the wife was entitled to a decree. The Court must consider a deed of separation as a possible bar to a decree in such a suit although it is not set up by the respondent.

WIFE'S PETITION for divorce on the ground of desertion.

By her petition, dated March 4, 1938, Mrs. Rebecca Cochrane Watson, prayed for the dissolution of her marriage, celebrated on February 15, 1917, at St. Andrew's parish church, Grimsby, on the ground that her husband, Mr. James Simpson Watson, an officer in the mercantile marine, had deserted her for a period of at least three years immediately preceding the presentation of the petition. The suit was undefended.

It was established that the husband deserted the wife in March, 1924. They entered in July, 1929, into a deed of separation the uncommon terms of which are reviewed in the judgment. The husband did not carry out his covenants. The suit was adjourned for argument on the question whether or not in law the deed terminated the desertion, thus depriving the petitioner of her remedy under the Matrimonial Causes Act, 1937.

Acton Pile for the petitioner. This is a case where the husband deserted the wife five years before the deed. The Court is therefore entitled to look into the circumstances surrounding the deed: *Cock* v. *Cock*. (1) The wife had a right to a decree of judicial separation when the deed was executed. She entered into it in order to avoid publicity and to obtain support, and not for the purpose of a separation which was forced on her years before. In fact the husband paid only 4*l*. 10s. in all in eight years, the deed was a dead letter, and his desertion continued till the present petition was presented. The Court is not bound to look at the deed as a bar to relief, as the respondent has not set it up: *Tress* v. *Tress*. (2)

[Counsel also referred to *Moore* v. *Moore* (3); *Hussey* v. *Hussey* (4); and *Smith* v. *Smith*. (5)]

1938. July 28. HODSON J. In this case the petitioner has proved to my satisfaction that her husband deserted her in 1924, when he walked out of the house using some abusive expressions to her, since when he has never returned. It is true that having left his wife, and a young child then only six years of age, a girl, he did make an offer three months later to provide a bed-sitting room for his wife in another part of the town in which he and his wife had lived together. The petitioner looked over the premises, and was told by her husband that there was room for her, but not that there was any room for the little girl, to whom no reference was made; and she, having seen the sort of place it was, decided, as I think she was entitled to do, that the offer was not a genuine offer, and did not accept it.

Thereafter the desertion continued, but the case stood over in order that I might consider the effect of an agreement signed on July 17, 1929, more than five years after the actual separation. The agreement signed by the husband and by the wife begins with this recital: "Whereas the husband "has deserted the wife and she is entitled to an order for "maintenance in a court of summary jurisdiction And "Whereas the parties are desirous of avoiding the publicity

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(1) (1864) 3 Sw. & Tr. 514.
(2) (1887) 12 P. D. 128.
(3) (1887) 12 P. D. 193.
(4) (1913) 29 Times L. R. 673.
(5) [1915] P. 288.

"of proceedings for such an order they have agreed to enter "into the arrangement hereinafter contained." That recital involves an admission by the husband that he had deserted his wife for the preceding five years, and confirms the view which I have taken as to the desertion which existed up to that time. The operative part of the agreement begins with a clause in the following terms: "Now it is hereby agreed: "That the parties shall henceforth live separate and apart "from each other and neither of them shall molest the other"; and it goes on with this clause: "The husband shall pay to "the wife during their joint lives the weekly sum of fifteen "shillings so long as she shall remain chaste such weekly "payment to commence on the 23rd day of July, 1929, and "to be paid on every Tuesday morning." The next provision is that the wife shall have the custody of the child, and there is a further provision that if by reason of the neglect of the wife the child shall become chargeable to the parish the agreement shall be void; and a concluding provision that: "Nothing herein contained shall operate to bar the wife in "the event of a breach of this agreement on the part of the "husband from her right to a maintenance order or other "order under the Summary Jurisdiction Acts."

No support was ever forthcoming from the husband to the wife, either for herself or for the child, until the execution of this document. The wife was in 1929 in financial need, and it was in those circumstances that she consulted solicitors, and the document came into existence as being a means by which she hoped she might obtain some financial provision from her husband. He never paid any substantial sum under the agreement, which he repudiated; indeed, his total payments amounted in all to 4*l.* 10*s.* The wife has never enforced the agreement against her husband, or attempted to do so. She carried on as best she could by letting rooms, and by keeping, or helping to keep, a shop.

The question is, whether the fact that this document was signed prevents the desertion, which had run for five years from 1924 to 1929, from running thereafter until the date of this petition. It was argued before me that the husband not having set up the deed as a defence, it was not incumbent upon the Court to do so, on the authority of certain cases, of which an illustration is the case of *Tress* v. *Tress.* (1) That was a decision in a suit for restitution of conjugal rights, and I do not think that one can get authority for the proposition that the Court is not bound to set up the deed in a case such as the present from a decision in such a suit. In a suit for restitution of conjugal rights it is incumbent upon a petitioner to prove that the respondent has refused, and still refuses, to render conjugal rights, and in order to satisfy the burden of proof the petitioner has to prove a demand and a refusal. It is implicit in that that the petitioner must be ready and willing to take the other spouse back, but it is not necessary, as it is in this case, to prove desertion affirmatively. The parting preceding a suit for restitution of conjugal rights may have originated in desertion by the petitioner.

In *Cock* v. *Cock* (2) the judge ordinary adjourned the case, where desertion was alleged, in order to consider the effect of a deed entered into by the husband and the wife some months before the actual parting. He said: "It is clear that "any separation between husband and wife which is the "result of mutual agreement, cannot constitute the 'desertion' "which the statute has made a ground for divorce." I think it is quite clear that if the separation is really, on investigation of the facts, found to be a separation by agreement, there can be no desertion, and, of course, a document such as a separation agreement is one of the matters which has to be examined.

There have been, however, cases where notwithstanding the existence of agreements of separation, the Court has been able to find desertion, and two cases to which I have been referred are *Hussey* v. *Hussey* (3) and *Smith* v. *Smith.* (4) In both these cases, desertion having taken place, the deserting spouse entered into an agreement with the deserted spouse, and repudiated the agreement after making a few payments. Horridge J. said in the latter case: "I am prepared to hold

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(1) 12 P. D. 128.
(2) 3 Sw. & Tr. 514, 515.
(3) 29 Times L. R. 673.
(4) [1915] P. 288.

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"that there was desertion, but I do so on the particular facts "of this case" and he goes on "It must not be taken, where "parties separate under a deed, that I should hold there has "been desertion merely because the husband has failed to "pay the allowance provided by the deed."

In this case the parties did not separate under a deed at all but because the husband deserted the wife, and the execution of the separation agreement was a mere incident in that desertion. It was not followed by the respondent observing the terms of the agreement, nor was it in any way sought to be enforced by the petitioner. On the facts of this case I find that the respondent has deserted his wife for a period of three years and upwards immediately preceding the date of this petition, and there will be a decree nisi.

Solicitor: *H. W. Newton.*

W. L.

THE AIZKARAI MENDI.

1938
June 20;
July 11.

Shipping—Damages—Loss of life—Assessment of damages under Fatal Accidents Acts—Interference with quantum of damages assessed by registrar—Damages under Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *for pain and suffering and loss of expectation of life—Elements of damage—Age factor—Method of assessment—Interest.*

In consequence of a collision with the defendants' vessel the plaintiffs' vessel sank with a loss of nine lives. On the reference to assess damages the registrar awarded to the dependents of the deceased seamen damages under the Fatal Accidents Acts and also to the representatives of each 150*l.* under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of loss of expectation of life and pain and suffering.

The defendants moved in objection to the report on the ground that the damages awarded under the Fatal Accidents Acts were excessive. The plaintiffs, by a cross-motion, alleged that the registrar was wrong in law in awarding the same sum in each case under the Law Reform (Miscellaneous Provisions) Act regardless of the ages of the deceased men, which varied from twenty-three to forty-four; that the amounts were inadequate; and that interest, which had not been provided for in the report, ought to be allowed at the rate of 5 per cent. from the date of the collision:—

Held, (A) that the damages awarded to the dependents under the Fatal Accidents Acts were in four of the cases excessive by about 20 per cent. to 25 per cent., but that having regard to the authorities on the question of reviewing quantum, and particularly to the observations in *The Amerika* [1914] P. 167 and *Flint* v. *Lovell* [1935] 1 K. B. 354, a difference of opinion even amounting to 25 per cent. did not justify the Court in interfering solely upon a question of quantum.

(B) that in any question of expectation of life the age factor could not be entirely negligible, and, if it was assumed that the pleasure of existence was equal, it seemed to follow that in the case of men in the same state of health and following the same calling the expectation of life of the younger men must exceed that of the older. Taking as a criterion, therefore, the sum of 1000*l.* which the Court of Appeal had awarded in *Rose* v. *Ford* [1937] A. C. 826 to a girl of twenty-three, and reducing that figure on the ground that the men were engaged in a dangerous trade in comparison with the deceased girl, and bearing in mind also that all those who would participate in the awards had been liberally compensated already, the Court arrived at a standard figure of 400*l.* for the men under thirty, 350*l.* for those over thirty, and 300*l.* for those over forty; and effect would be given to the view that four of the widows had been over-compensated by making a substantial reduction of the standard share in those four cases—namely, 200*l.* instead of 400*l.* and 150*l.* instead of 300*l.*

Held, further, that no case had been made out for departing from the usual practice of allowing interest on damages in respect of loss of life at 4 per cent. from the date of the registrar's report.

THESE were cross-motions in objection to the report of the registrar on a reference to assess damages arising out of a collision between the plaintiffs' steamship *Boree* and the defendants' steamship *Aizkarai Mendi*. The *Boree* sank in consequence of the collision with a loss of nine lives.

In the action brought by the owners of the *Boree* against the owners of the *Aizkarai Mendi*, the *Boree* was found one-fifth to blame and the *Aizkarai Mendi* four-fifths to blame.

On the reference the registrar awarded to the dependents of the deceased men damages under the Fatal Accidents Acts, and, in addition, to the representatives of each 150*l.* under the Law Reform (Miscellaneous Provisions) Act, 1934 (1), in respect of loss of expectation of life and pain and suffering.

The defendants moved in objection to the report on the ground that the damages under the Fatal Accidents Acts were excessive. The plaintiffs, by their cross-motion in objection to the report, alleged that the registrar was wrong in law in awarding the same sum under the Act of 1934 to the representatives of each of the deceased members of the crew without regard to the differing circumstances, age, and prospective length of life of the respective men, and that the amounts allowed were inadequate.

The plaintiffs further alleged that interest, which had not been provided for in the registrar's report, ought to be allowed at 5 per cent. per annum on the sums awarded in respect of loss of life from the date of the casualty.

In his "reasons" for the awards of 150*l.* under the Law Reform (Miscellaneous Provisions) Act, 1934, the registrar reported as follows :—

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(1) Sect. 1, sub-s. 1, provides as follows : "Subject to the pro-"visions of this section, on the "death of any person after the "commencement of this Act all "causes of action . . . . vested "in him shall survive . . . . for "the benefit of his estate."

"It is clear that the factors which have to be considered "in assessing the damage under the Law Reform (Miscellaneous "Provisions) Act are the pain and suffering endured by the "deceased between the negligent act of the defendants and "the death of each of these men and the loss of the normal "expectancy of life.

"The collision which caused their deaths happened about "6.50 A.M. in dense fog on a bitterly cold day in March. The "ship turned turtle before she finally sunk. Some of the men "who were saved were swimming in the water for two hours "or more before they were rescued, and some of them were "picked up by another vessel which was in the vicinity. This "shows the length of time during which the men who were "lost had to endure pain and suffering before they met their "death by drowning. There is no direct evidence as to the "precise manner in which they lost their lives, but it is quite "possible that some of the engineers were imprisoned in the "ship when she turned turtle, and remained imprisoned "until she finally filled and went to the bottom.

"In addition to the pain and suffering which these men "would undoubtedly experience, their dependents also laid "stress on the damage suffered by their loss of expectation "of life and it was contended that as the ages of the drowned "men varied, the damages to their estate must also vary in the "same proportion.

"We have had regard to s. 1, sub-s. 5, of the Act of 1934 "which provides that the right conferred by the Act is to be "in addition to and not in derogation of any right conferred "on the dependents of these men by the Fatal Accidents Act "of 1846. We have accordingly given the dependents the "sums we considered they were entitled to under that Act "and we have then considered what further sums should be "awarded under s. 1 of the Act of 1934. It is to be borne in "mind that in this country in most of these cases, if less than "1000*l*. is awarded to the deceased's estate, it can only benefit "the deceased's creditors or the widow, for the widow would "take the first 1000*l*. by virtue of s. 46 of the Administration "of Estates Act, 1925, and the children to whom separate "awards have been made, would in those cases not benefit "and the awards made to them could not be effected. There "was no evidence before us that the law of France was "different to that of this country.

"We have kept in view the observations of Lord Wright "in his speech to the House of Lords in *Rose* v. *Ford* (1), and "we have taken into account that we are giving damages "under Lord Campbell's Act, to those who may benefit by the "sums awarded to the estates of the deceased men under the "Act of 1934 and that the future earning power of these men "is properly dealt with in the actions brought under the Fatal "Accidents Act, 1846.

"It is extremely difficult to assess in money the pain and "suffering which these men went through, but we do know "that several of those who were saved were injured by frost-"bite, and suffered from contusions and bronchitis. It was "suggested that with regard to the damages for loss of "expectation of life, these ought to vary in proportion to the "ages of the men who were drowned. The oldest sailor was "forty-four and the youngest was twenty-three.

"Following the principles laid down for our guidance in "*Rose* v. *Ford* (1), we have to assess a fair and moderate sum "in view of all the uncertainties and contingencies of human "life and arrive at a sum which is to represent what life is "worth to healthy men earning their living and whose "dependents have received all they would have received if "the men had lived for their normal span of life.

"Some of them had probably lived long enough to look "forward to their retirement, and their joy in life was "probably due to the fact that their future was assured and "that provision had been made for their latter years. The "younger men on the other hand, were still engaged in "making provision for themselves and their dependents, and "to them the joy of life largely consisted in their endeavours "to better their own lot and that of their dependents. We "do not think that damages under this head should depend "on the precise age of the deceased men and be calculated in

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(1) [1937] A. C. 826.

"proportion to their ages. They are all still in active life and "the joy they get of it is much the same whether they find "it in what they have done or in the hope of what they may do.

"Upon the evidence before us, we came to the conclusion "that 150*l.* was the proper award to make in each of these "cases."

Owen Bateson for the defendants. The awards to the dependents under Lord Campbell's Act are excessive.

[Langton J. I think some of them are too high by 20 per cent. to 25 per cent.]

Gordon Willmer for the plaintiffs. Comparing these damages with those given by juries in the King's Bench Division, they are not by any means excessive; but the Court cannot alter the awards, even if it thinks them too high, unless there is some error in principle or the awards are so unfair that the conscience of the Court is shocked: see the observations of Buckley and Kennedy L.JJ. in *The Amerika* (1) and of Greer L.J. in *Flint* v. *Lovell.* (2) In the present case there is no such great difference between the amounts awarded and the amounts the Court is disposed to think are the proper amounts as there were in *Roach* v. *Yates* (3), when 2742*l.* was increased to 6542*l.*, or *Shepherd* v. *Hunter* (4), where the Court of Appeal said that an award of 90*l.* by a jury in respect of the loss of expectation of life of a child of three was " clearly erroneous " and ordered a new trial.

On the plaintiffs' cross-appeal, the registrar, it is submitted, has erred in principle in awarding 150*l.* under the Law Reform (Miscellaneous Provisions) Act, 1934, to the estates of each of the nine persons drowned regardless of their ages, and 150*l.* is inadequate even in the case of the oldest of them. The pain and suffering may, as the registrar finds, have been much the same in each case; but in *Rose* v. *Ford* (5), the leading authority on the question, Lord Wright clearly had in mind the probable length of life of the deceased but for the accident, and the expectation of life of a man of twenty-three must certainly be greater than that of a man of forty-four.

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(1) [1914] P. 167, 182, 184.
(2) [1935] 1 K. B. 354, 360.
(3) [1938] 1 K. B. 256.
(4) [1938] 2 All E. R. 587.
(5) [1937] A. C. 826.

The cases on loss of expectation of life fall into two groups: (A) those in which there were no separate claims under Lord Campbell's Act and (B) those in which there were awards under that Act.

Under (A) Greaves-Lord J. in *Turbyfield* v. *Great Western Ry. Co.* (1) gave 150*l.* to the representatives of a child of eight, and in *Flint* v. *Lovell* (2) the Court of Appeal refused to interfere with an award of 4400*l.* to a man of seventy who was seriously injured but not killed: see also *Roach* v. *Yates* (3), where a man of thirty-five, who had been injured for life, was awarded on appeal 6542*l.* It is also right to mention, although it is submitted that the learned judge would have been wrong, that in *Bailey* v. *Howard* (4), where a common jury had awarded 1000*l.* for pain and suffering and loss of expectation of life in respect of the death of a child of three, Charles J. said that he would have given 150*l.*

In the second group (B) are *Rose* v. *Ford* (5), where the deceased girl was twenty-three, and 300*l.* was awarded under Lord Campbell's Act and 1000*l.* under the Act of 1934; *May* v. *McAlpine & Sons (London), Ld.* (6), where the jury awarded 600*l.* in a case in which the dependents of the deceased, a labourer aged forty, had received 2050*l.* under Lord Campbell's Act: see also *Morgan* v. *Scoulding* (7), and *Feay* v. *Barnwell.* (8) All these cases show that 150*l.* in respect of even the oldest of these seamen is too little, and, as the registrar deliberately ignored the difference in their ages, the damages were awarded on the wrong principle and should be reassessed.

No interest has been allowed at all on the claims. In any event the plaintiffs are entitled to interest at 4 per cent. from the date of the report; that is the usual practice, but there is no adequate reason for it: damages are crystallized at the collision (*The Northumbria* (9)): and damages in respect of loss of, or injury to, property bear interest at 5 per cent. from the date of the loss or as from the date the principal repair bill has been paid: see Roscoe's Measure of Damages in Maritime Collisions, 3rd ed., p. 37. These widows and orphans have been out of their money for over two years, and in these circumstances this is a proper case for interest to be allowed from the date of the collision at 5 per cent.

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(1) [1938] W. N. 12.
(2) [1935] 1 K. B. 354.
(3) [1938] 1 K. B. 256.
(4) The Times, May 10, 1938.
(5) [1937] A. C. 826.
(6) (1938) 54 Times L. R. 850.
(7) [1938] 1 K. B. 786.
(8) [1938] 1 All E. R. 31.
(9) (1869) L. R. 3 A. & E. 6.

Owen Bateson. The registrar has not erred in principle in assessing the damages under the Act of 1934. He gives reasons in his report for his view that the joy of life was much the same in all these cases, and that damages under that head ought not to depend upon the precise ages of the deceased men.

[LANGTON J. The registrar appears to take the view that the " joy " of life is more important than the " expectation " of life. Is not that wrong ?]

Owing to the dangers and chances of life in the calling they followed their exact ages do not affect the question. They were all healthy men and everything else was equal. There is no principle involved in the cases, and the defendants have not appealed against these awards; but, if the damages are to be reassessed, 150*l.* is not insufficient : indeed, having regard to the excessive sums awarded under Lord Campbell's Act the Court may think 150*l.* is too much. In *Shepherd* v. *Hunter* (1), although the Court of Appeal ordered a new trial, MacKinnon L.J. evidently thought that a small sum would be sufficient.

As regards interest, it is admitted that it has been the practice to allow interest at 4 per cent. on the damages awarded in respect of loss of life, but only from the date of the report. Life claims are in a different position from property claims. The dependents are maintained by a lump sum which is taken to represent what the deceased would have earned during his life, and not a sum, therefore, which would earn interest. When the innocent parties have lost or repaired their ship, obviously they are entitled to interest from that date. Certainly there is no reason to raise the rate of interest from 4 per cent. to 5 per cent., particularly at the present time. This question was discussed recently in *The Theems* (2) on

(1) [1938] 2 All E. R. 587.

(2) Ante, p. 197.

the question of the proper rate to be allowed in limitation suits.

On the question of the awards under Lord Campbell's Act, if the Court thinks that some of them are 20 per cent. or 25 per cent. too high, that is sufficient to justify setting them aside. It is so much too much as to be unjust: see Kennedy's Civil Salvage, 3rd ed., pp. 187–189, on the alteration of salvage awards, to which the same principles apply, and the observations of Lord Esher M.R. in *The Accomac.* (1)

Cur. adv. vult.

1938. July 11. LANGTON J. read the following judgment: The collision out of which this matter arises took place upon March 26, 1936. As a result of the collision the plaintiffs' vessel, the *Boree*, was lost, and nine members of her crew were drowned. By a decree of this Court dated March 11, 1937, the *Boree* was held liable as to one-fifth of the damages and the defendants' vessel, the *Aizkarai Mendi*, was held liable for the remaining four-fifths of the damage caused by the collision. The case went to the Court of Appeal, but the finding of the Admiralty Court was not disturbed, and the appeal was dismissed on December 2, 1937. The plaintiffs then proceeded to present their claim to the Admiralty registrar, who delivered his report thereon on March 30, 1938.

The matter comes before me in the form of objections and cross-objections to the registrar's report. The items of objection and cross-objection are all concerned with the awards made by the registrar in respect of claims arising out of the deaths of the nine members of the crew who were drowned.

The defendants object to all the allowances made by the registrar in respect of items 16 to 24 inclusive which are in fact awards by way of damages to dependents of the deceased men under Lord Campbell's Act. The plaintiffs object to the items 16a, 17a, etc., to 24a, and to the registrar's refusal to award any sum by way of interest upon the claims.

The objections raised by the defendants to the amounts awarded under the Fatal Accidents Acts have put me in a situation of very great difficulty.

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(1) [1891] P. 349, 354.

Under each of the principal items, 16 to 24, the registrar has awarded separate and individual amounts to each of the relatives. This is, of course, the best and only proper way of dealing with such a body of claims. The method has this additional advantage that it gives a clear and ready conspectus not only of what any individual will receive, but also of the total compensation which any family has been awarded.

To take item 16 as an illustration, it will be seen that the widow of the second engineer, Mme. Chourot, has been awarded 4060*l.* for herself, that her son of two years of age is to receive 700*l.* and her mother-in-law of sixty, 440*l.* The whole family of three will thus receive a total of 5200*l.* under the Fatal Accidents Acts alone, irrespective of any amount awarded to the second engineer's estate under the Law Reform (Miscellaneous Provisions) Act, 1934. I have dwelt especially upon the family aspect of the matter because it seems to me to be material in considering the compensation awarded to the widow that, while she has been awarded more than twelve times the full value of the highest wage that her husband has ever earned, she will neither have to provide for or keep a home for her husband in the future nor have her son or her mother-in-law fully dependent upon her.

Mr. Willmer, on behalf of the plaintiffs, argued that I was not entitled to make any use of such knowledge as I might myself possess of economic conditions or of earnings and chances of earnings in France. Further, in presenting a very reasonable argument that one must move with the times, he pushed it so far as to say that judges in this Division must move with the juries in the King's Bench Division, and that the standard of damages set up in that Division afforded the real criterion upon which this Division should proceed. I mention these arguments only in order to record that I do not assent to them, but it would serve no good purpose to state the reasons for my disagreement, since in view of another consideration which Mr. Willmer has put before me, it is a matter of only academic importance whether I agree or dissent.

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Upon a careful review of all the evidence in the case I arrived at the conclusion that Mme. Chourot, widow of the second engineer (item 16), and Mme. Le Cavorzin, the widow of the vessel's cook (item 17), Mme. Hèry, widow of Ange Hèry, a sailor (item 18), and Mme. Rouget, widow of Jean Rouget, a seaman (item 22), have all been awarded amounts which appear to me to be excessive to the extent of about 20 or 25 per cent. I would accept immediately that where a difference between the original award and that which a tribunal of review would be inclined to give is no more than 10 per cent. of the total it is difficult if not impossible to say that one is wrong and the other is right. Where, on the other hand, the difference between the two figures is so considerable as to amount to a fifth or even a quarter of the whole, there does not seem to be much difficulty in saying that one must be right and the other wrong. I cannot, however, read the various pronouncements of the Court of Appeal of recent times upon this topic of review of quantum as allowing me to interfere with the awards of the registrar in this case. In *The Amerika* (1) this subject came to the notice of the Court of Appeal upon the finding of the registrar and merchants with regard to the value of a lost submarine. The President, Sir Samuel Evans, reduced the amount of 26,500*l.* awarded by the registrar to 23,850*l.*; but a very strong Court of Appeal, consisting of Buckley and Kennedy L.JJ. and Scrutton J., as he then was, held that the President was wrong to interfere with the award and restored the original figure arrived at by the registrar and merchants. Lord Wrenbury, then Buckley L.J., uses this language: "The Court refuses to "interfere with quantum except in exceptional circumstances. "More than one instance may be put. The first which occurs "to my mind is in respect of salvage. The Court does not "interfere unless the case is so strong that the Court thinks a "wrong sum has been arrived at as a matter of principle, or "the award is so unfair, either to the salvor or the salved, that "the conscience of the Court is shocked.

" A second case is the taxation of costs, when there arises "a question as to the proper sum to be allowed. The Court

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(1) [1914] P. 167, 182, 184.

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"never interferes there in the absence of some question of "principle. The present case is another instance." Kennedy L.J. attempted to summarize all the cases in which a tribunal of review might interfere, and presents the summary as follows: "I apprehend that in a general way the assessment "of damages takes place before a specially constituted tribunal, "and I may add a tribunal so constituted as to include both "skilled and legal elements—the element of skill in business "and mercantile affairs, as well as a trained lawyer with "special admiralty knowledge. The Court above ought not, "therefore, except in very exceptional circumstances, to "interfere with the decision of the assessing tribunal unless "some error in principle is pointed out or there is an obvious "error in the calculations regarding figures, or a plain mis-"understanding of some material portion of the evidence "before the assessing tribunal. I can think of no other reason "upon which the Court above ought to interfere with the "assessment, and it is not suggested here that there is any "error in principle, or error in calculation, or plain misunder-"standing of evidence, which lay at the root of the assessment "to which the learned assistant registrar and his assessors "came."

It is true that the matter then before the Court was not a question of life claims and that Kennedy L.J. does not specially mention that class of case in his summary. As Mr. Bateson pointed out, the registrar and merchants would hardly claim any special skill in business and mercantile affairs which put them upon a higher plane or in a better position in dealing with such claims than a jury or even a judge. But I cannot perceive that there is any real difference in principle between awards of salvage, and awards of damages either for loss of property or loss of life or assessments of costs. As lately as the year 1934 Greer L.J., in dealing with the case of *Flint* v. *Lovell* (1), said this: "In order to justify reversing the trial judge on the "question of the amount of damages it will generally be "necessary that this Court should be convinced either that the "judge acted upon some wrong principle of law, or that the

(1) [1935] 1 K. B. 354, 360.

"amount awarded was so extremely high or so very small as "to make it, in the judgment of this Court, an entirely erroneous "estimate of the damage to which the plaintiff is entitled." I take this statement from one who has sat for very many years in the Court of Appeal as being completely authoritative, and taking it together with the language used by the Lords Justices in *The Amerika* (1) I cannot think that a difference of opinion even amounting to 25 per cent. could justify an interference upon quantum only. There is no suggestion here of an error in principle, and it would be straining language out of all ordinary meaning to say that the assessments here were either extreme or absurd. Neither could it by any stretch of imagination be said that any of the registrar's figures are so "unfair that the conscience of the Court is shocked." It is indeed only fair to the registrar to add that in respect of the items here objected to by the defendants, he was not invited to state his reasons, and I have not, therefore, had the opportunity, which I might otherwise have been afforded, of understanding fully the lines upon which his assessments were based.

Passing now to the plaintiffs' objections, the point here arising under items 16a, 17a, etc., to 24a, rests in the first instance upon a consideration of the thorny topic of loss of expectation of life. The registrar has dealt with the claims under this head by awarding the sum of 150*l.* to each personal representative irrespective of the station, earnings or age of the deceased man. The objection of the plaintiffs to this assessment proceeds upon two lines. In the first place they object on the ground that all the assessments are too low, and secondly, they say that under no correct principle of assessment could all have worked out at the same figure. Accordingly they present their objections in the form of saying that there is an error in principle in the method of assessment, and that all the awards should be increased, though in varying amounts.

Happily in this instance we are not without guidance in the shape of the reasons of the learned registrar. In a very clear and careful statement, the registrar has pointed out how

(1) [1914] P. 167.

he has attempted to apply the law laid down by the House of Lords in *Rose* v. *Ford*. (1)

The learned registrar will I know forgive me for saying (indeed I rather suspect that he will cordially endorse the view) that this is a most unfortunate subject to be dealt with by the vehicle of registrar's reasons. If I have read the opinions of the Law Lords in *Rose* v. *Ford* (1) rightly, especially the outspoken view of Lord Roche (2), they are inclined to think that the greater part of the difficulty which has lately come to surround this subject arises from the fact that an undue prominence has been assigned in recent cases—notably *Flint* v. *Lovell* (3)—to a head of damage which had hitherto always existed as an element, though not a very prominent one, in the assessment of general damages. The fault lies therefore in over-analysis, and it is much to be deplored that the registrar should be placed in a position in which he is forced to analyse with particularity the various elements that have gone to the composition of his awards. At any rate no complaint can be made on the score that he has shirked a difficult and ungrateful task.

Taking first the factor of pain and suffering endured respectively by the deceased men between the occurrence of the negligent act causing their deaths and the respective deaths, he gives convincing reasons why in the present case it is not possible to make any distinction between them.

Taking next the point as to the individuals who may be expected to profit under this head of damage, he points out that since there is no evidence in this case concerning the law of France he has presumed that it is identical in this matter with the law of this country. He arrives accordingly at the conclusion, which is not challenged by either side, that the widows, in each instance, where such exist, will be the first and perhaps the only individuals to profit under the Act of 1934.

He then records the fact that the eldest of these men was forty-four years of age whilst the youngest was twenty-three.

(1) [1937] A. C. 826.
(2) Ibid. 860-862.
(3) [1935] 1 K. B. 354.

It is clear, therefore, that the question of disparity in age was present to his mind when making these awards. But having noted this somewhat wide disparity, he then proceeds to attempt to measure the respective loss in value to each man by the single standard of the amount of enjoyment which they might be expected to have derived from their calling and circumstances. So far as the standard itself is concerned, I see no reason at all to quarrel with the very sensible conclusion at which he arrives upon this topic, and which he sums up succinctly in a single sentence: "They are all still in active "life and the joy they get of it is much the same whether "they find it in what they have done or in the hope of what "they may do." This topic of the enjoyment of human life seems to me to be the most difficult and most controversial of all the elements of damage which may fall to be considered under this Act of Parliament, but in the present instance I do not see how the registrar upon the evidence before him could have done better than he has done. Having arrived, however, at the conclusion that there are no differences to be made on the score of pain and suffering on the one hand or pleasure in existence on the other, the question arises as to whether he has exhausted all the elements of damage which here fall to be considered. To my thinking there exists a further question raised by the idea of expectation. I am very loth indeed to seem to disregard the advice of Lord Roche in *Rose* v. *Ford* (1), for which I have nothing but admiration, and to stray still further than the registrar has been forced to do along the dangerous path of analysis and segregation. But I cannot bring myself to believe that in any question of expectation of life the factor of age can be entirely negligible. I appreciate fully that this age or time factor is not to be handled arithmetically. The chances and therefore the expectation of life of a very young child may not, for obvious reasons, be so good as those of a healthy adult who has survived the many dangers of childish ailments without physical impairment. But the very notion of expectation seems to me to connote time, and, if the good which forms the subject

(1) [1937] A. C. 826.

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of expectation is rated equal over a given number of cases, the time factor seems to me necessarily to assume importance. To apply this reasoning to the present case, if one assumes that the pleasure in existence derived by two men of different ages is equal, it appears to me to follow that, if both are in the same state of health and are following the same calling with the same kind of risk, the expectation of life of the younger man must exceed that of his elder. It is upon this question of the time factor which he seems to have had in mind, but to have ignored deliberately, that the registrar's reasons appear to me to be illogical. It seems perhaps a trifle grandiloquent to describe this very minor illogicality as an error in principle, but since it is not a mere question of quantum, it is no doubt in the language of legal argument properly so described. Upon the question of quantum, too, I think that the registrar has erred, so far as these claims are concerned, and erred upon the side of illiberality.

The fact that he is, to my thinking, wrong in the principle of assessment would, I suppose, in any event entitle me to alter his assessments if I thought it right to do so, even though the alterations which I thought fit to make were of comparatively minor degree. Nor have I been insensible to the temptation to let the evil, if evil there be, remedy itself by not interfering with the awards under this head, which seem to me to be too low, and leaving their inadequacy to be compensated by the assessments under the Fatal Accidents Acts, which have seemed to me to be uniformly too high. Without, however, entering into the controversial ethical point as to whether it can ever be permissible to remedy one acknowledged wrong by perpetuating or allowing another, there are further difficulties in the way of pursuing this tempting course. To state only one of them it would do nothing to remedy the illogicality of having ignored the time factor.

I have accordingly felt obliged to face the distasteful task with which the registrar was confronted of dealing with these claims under the Act of 1934 in conjunction with the claims under the Fatal Accidents Acts.

Again, in order to explain my method of assessment, I have to depart from Lord Roche's wise advice, and descend to wearisome and possibly erroneous depths of analysis. Starting from the passage in Lord Wright's speech in *Rose* v. *Ford* (1) in which he lays down how the matter should be put in direction to a jury in order to avoid duplication, I have followed the application of this direction which was employed by Branson J. in *May* v. *McAlpine & Sons* (*London*), *Ld.* (2)

I have first taken a sum of 1000*l.* such as was awarded in the case of *Rose* v. *Ford* (1) by the Court of Appeal (and not disturbed in the House of Lords) to an adult young woman of twenty-three years of age.

Next, without usurping the right to correct the registrar's awards under the Fatal Accidents Acts, which the practice laid down by the Court of Appeal forbids me to do, I have thought it right to bear in mind that in my view all the participants under those Acts have been generously compensated, and that in the four specific instances which I have mentioned (all of them widows who will probably receive the whole of the money assessed under this Act) they have been largely over-compensated.

Finally, I have endeavoured to classify the nine claims with due regard to what I have called the age or time factor. Clearly no one could pretend to quantify claims of this character with such exactitude as to measure them exactly year by year. In this case the nine claims seem to me to fall easily into three distinct classes. There are four men whose ages rank between forty-one and forty-four. Two are in their thirties, being aged thirty-five and thirty-seven respectively, and three are younger men aged from twenty-three to twenty-six. I have greatly reduced the figure of 1000*l.* upon the view that all the men in question were engaged upon a dangerous trade in comparison with the deceased girl in *Rose* v. *Ford* (3), and still further reduced it on the score that all likely participants of which we have any knowledge have been liberally compensated already under the Fatal Accidents Acts.

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(1) [1937] A. C. 826, 852, 853.

(2) 54 Times L. R. 850.

(3) [1937] A. C. 826.

This has left me with a standard figure of 400*l*. for the highest class—namely, the men of under thirty.

I have graded the three classes as deserving 300*l*., 350*l*. and 400*l*. respectively, and I have given effect to my view as to the over-compensation of the widows Chourot, Le Cavorzin, Hèry and Rouget by a very substantial diminution of their standard shares. I am conscious that this last line of assessment will have to be justified upon broader grounds than those of strict logic. I have preferred to do a little violence to the logic which would compel me to accept the registrar's awards under the Fatal Accidents Acts as being right since I cannot disturb them, rather than to perpetrate a paradox of injustice by which I should largely increase the compensation awarded to individuals who are already in my view too highly recompensed.

The awards upon these items will therefore be:

CLASS I.

17a. Le Cavorzin (41) 150*l*. 21a. E. J. M. Clement (41) 300*l*. 18a. Ange Hèry (44) 150*l*. 19a. Joseph Durand (44) 300*l*.

CLASS II.

23a. P. L. M. Le Roy (35) 350*l*. 20a. Georges Le Guerannic (37) 350*l*.

CLASS III.

24a. Fernand Auvray (23) 400*l*. 16a. Roland Chourot (25) 200*l*. 22a. Jean Rouget (26) 200*l*.

There remains the question which has been argued before me as to the proper rate of interest to be allowed upon all these life claims under either head. The registrar has not dealt with it in his reasons, and has, as I understand the matter, omitted to make any allowance for interest at all. Having weighed very carefully the reasons put before me by Mr. Willmer for changing the practice which has hitherto existed, I do not think that any case has been made out for a change. Insomuch, however, as the registrar has in this case departed from the usual practice by not giving interest from the date of the report, I think his report should be varied to bring it in accordance with the established practice. There

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will therefore be interest at the rate of 4 per cent. from the date of the report upon all the items which are the subject of these objections.

Solicitors for the plaintiffs: *Bentleys, Stokes & Lowless.*
Solicitors for the defendants: *William A. Crump & Son.*

E. C. M. T.

END OF VOL. AND OF PROBATE SERIES FOR 1938.

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